92-130

No. ———

Supreme Court, U.S.
FILED
JUL 20 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners,

v.

LYNN MARTIN, SECRETARY OF LABOR, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

LAURENCE J. COHEN
TERRY R. YELLIG
(Counsel of Record)
1125 15th Street, N.W.
Washington, D.C. 20005
(202) 785-9300
Attorneys for Petitioner Building and Construction Trades Department, AFL-CIO

ROBERT J. CONNERTON
PHILLIS PAYNE
PAUL GREENBERG
1920 L Street, N.W.
Washington, D.C. 20036
(202) 466-6790
Attorneys for Petitioner Laborers' International Union of North America, AFL-CIO

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

® 60

QUESTIONS PRESENTED

1. Whether the Secretary of Labor can exclude from consideration entirely the "various classes of laborers . . ." (40 U.S.C. § 276a) when determining whether a "helper" class is a "prevailing" classification under the Davis-Bacon Act.

2. Whether the "helper" regulation conforms to the requirements of the Administrative Procedures Act where the sole rationale for excluding practices of "various classes of laborers . . ." advanced by the Secretary of Labor is her alleged "experience," and where her justification for the rule is totally unsupported and contradicted by the record.

3. Whether the court of appeals can adopt the *post hoc* rationalization of counsel that the Secretary of Labor will consider the practices of "various classes of laborers . . ." in determining whether a "helper" is "prevailing" under the Davis-Bacon Act, where that rationalization is inconsistent with the Secretary's own explanation for her regulation.

4. Whether Congress, in enacting two recent appropriations bills during the *same* session prohibiting the Secretary of Labor from expending funds to "implement or administer" the helper regulation (or "any other regulation" with "the same or similar effect"), intended permanently to bar the Secretary from so acting.

PARTIES

The following parties appeared below as plaintiffs-appellants:

Building and Construction Trades Department, AFL-CIO;

American Federation of Labor and Congress of Industries Organizations (AFL-CIO);

Laborers' International Union of North America, AFL-CIO;

International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO;

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO;

International Union of Bricklayers and Allied Craftsmen, AFL-CIO;

United Brotherhood of Carpenters and Joiners of America, AFL-CIO;

International Brotherhood of Electrical Workers, AFL-CIO;

International Union of Elevator Constructors, AFL-CIO;

International Union of Operating Engineers, AFL-CIO;

International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO;

Tile, Marble, Terrazzo, Finishers and Shopmen International Union, AFL-CIO;

International Union of Painters and Allied Trades, AFL-CIO;

Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO;

United Union of Roofers, Waterproofers and Allied Workers, AFL-CIO;

Sheet Metal Workers' International Association, AFL-CIO;

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO; and

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO

The following parties appeared below as defendants-appellees:

Lynn Martin
Secretary of Labor
United States Department of Labor

Elizabeth H. Dole
Secretary of Labor
United States Department of Labor

The *amicus curiae* below were Associated Builders and Contractors, Inc. and the Landmark Center for Civil Rights.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE FACTS AND THE CASE	2
REASONS FOR GRANTING THE WRIT	10
I. THE IMPORTANCE OF THE STATE INTERESTS AND LABOR RELATIONS INTERESTS AT ISSUE	10
II. THE DECISION BELOW CONFLICTS WITH THE DAVIS-BACON ACT BECAUSE IT DOES NOT TAKE INTO CONSIDERATION THE "VARIOUS CLASSES OF LABORERS . . ."	12
III. THE DECISION BELOW CONFLICTS WITH THE DOCTRINE OF THIS COURT, AND MISAPPLIES THE ADMINISTRATIVE PROCEDURES ACT, BY UPHOLDING A RULE THAT IS NOT SUPPORTED BY THE RECORD, AND WHICH IS JUSTIFIED MERELY BY AN ASSERTION OF THE SECRETARY'S "EXPERIENCE"	15
IV. THE DECISION BELOW CONFLICTS WITH THE DOCTRINE OF THIS COURT UNDER THE ADMINISTRATIVE PROCEDURES ACT THAT THE REVIEWING COURT MAY NOT RELY UPON COUNSEL'S POST HOC RATIONALIZATION OF A RULE	19

TABLE OF CONTENTS—Continued

Page

V. THE DECISION BELOW CONFLICTS WITH TWO RECENT APPROPRIATIONS ACTS OF CONGRESS WHICH PERMANENTLY PROHIBIT THE SECRETARY OF LABOR FROM EXPENDING FUNDS TO "IMPLEMENT" THE HELPER REGULATION OR ANY OTHER REGULATION "WITH THE SAME OR SIMILAR EFFECT" 20

CONCLUSION 30

TABLE OF AUTHORITIES

CASES: Page

Andrus v. Shell Oil Co., 446 U.S. 657 (1980) 29
Bowen v. American Hospital Ass'n, 476 U.S. 610 (1986) 18
Bowen v. Georgetown University Hospital, et al., 488 U.S. 204 (1988) 19
Building & Construction Trades Department, AFL-CIO v. Dole, 29 Wage & Hour Cas. (BNA) 1607, 116 Lab. Cas. (CCH) ¶ 35,395 (D.D.C. 1990) .. 1, 5
Building & Construction Trades Dept., et al. v. Dole, Slip Op., Case No. 90-5345 (D.D.C. January 30, 1991) 2, 5
Building & Construction Trades Department, AFL-CIO v. Donovan, 553 F. Supp. 352 (D.D.C. 1982) 2, 3
Building & Construction Trades Department, AFL-CIO v. Donovan, 102 CCH Lab. Cas. ¶ 34,648 (D.D.C. 1984) 2, 4
Building & Constr. Trades Dep't v. Donovan, 543 F. Supp. 1282 (D.D.C. 1982) 11
Building & Constr. Trades Dep't v. Donovan, 712 F.2d 611 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984) 2, 4, 12, 14, 16
Building and Construction Trades Department, et al. v. Martin, et al., 961 F.2d 269 (D.C. Cir. 1992) 1, 9, 10, 23, 24
Burlington Truck Lines v. United States, 371 U.S. 156 (1982) 19
Elizabeth Norcross, 142 Cl. Ct. 763 (1958) 21, 22
Fertilizer Institute v. U.S. Environmental Protection Agency, 935 F.2d 1303 (D.C. Cir. 1991) 14
Friends of the Earth v. Armstrong, 485 F.2d 1, 9 (10th Cir. 1973), *cert. denied sub nom. Friends of the Earth v. Stamm*, 414 U.S. 1171 (1974) 21
Gozlon-Peretz v. United States, —— U.S. ——, 111 S. Ct. 840 (1991) 28
Los Angeles v. Adams, 556 F.2d 40 (D.C. Cir. 1977) 21
Matter of Federal Judges IV, 65 Comp. Gen. 352 (1986) 22, 25

TABLE OF AUTHORITIES—Continued

	Page
Matter of Permanency of Weapons Testing Moratorium, 65 Comp. Gen. 588 (1986)	22, 25
Minis v. United States, 40 U.S. (15 Pet.) 423 (1841)	25, 26
Motor Vehicles Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29 (1983)	18, 19
Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985)	19
Nat'l Senior Citizens Law Center v. Legal Services Corp., 751 F.2d 1391 (D.C. Cir. 1985)	29
National Treasury Employees Union v. Devine, 733 F.2d 114 (D.C. Cir. 1984)	21
National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, *reh. denied*, 387 U.S. 926 (1967)	29
NLRB v. Bell Aerospace Co., Div. of Textron, Inc., 416 U.S. 267 (1974)	28
Red Lion Broadcasting Co. v. Federal Communications Comm., 395 U.S. 367 (1969)	28
Reiter v. Sonotone, 442 U.S. 330 (1979)	27
Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572 (1980)	28
SEC v. Chenery Corp., 332 U.S. 783 (1947)	18, 19
Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942)	29
United States v. Binghamton Constr. Co., 347 U.S. 171 (1954), *reh. denied*, 347 U.S. 940 (1954)	10, 14
United States v. Menasche, 348 U.S. 528 (1955)	27
United States v. United Mine Workers, 330 U.S. 258 (1947)	28
United States v. Wise, 370 U.S. 405 (1962)	28
Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981)	10
Walsh v. Schlect, 429 U.S. 401 (1977)	10

STATUTES:

Administrative Procedures Act

5 U.S.C. § 553	2, 18, 19
5 U.S.C. § 706	2

TABLE OF AUTHORITIES—Continued

	Page
Davis-Bacon Act of 1935, 40 U.S.C. § 276a *et seq.*	*passim*
Dire Emergency Supplemental Appropriations For Consequences of Operation Desert Shield/Desert Storm, Food Stamps, Unemployment Compensation Administration, Veterans Compensation and Pensions, and Other Urgent Needs Act of 1991, Pub. L. No. 102-27, 105 Stat. 130 *et seq.*	*passim*
Department of Labor, Health and Human Services, and Education and Related Agencies Appropriations Act of 1992, Pub. Law. 102-170, 105 Stat. 1107	*passim*
12 U.S.C. § 1254(1)	2
REGULATIONS:	
29 C.F.R. § 1.7(d)(1)	12, 13, 20
29 C.F.R. § 1.7(d)(2)	20
29 C.F.R. § 5.1	10
29 C.F.R. § 5.2(n)(4)	4, 15
47 Fed. Reg. 23644	3
23651	16
23658	3
23663-23664	16
52 Fed. Reg. 31366-67	4, 16
52 Fed. Reg. 31370	16
54 Fed. Reg. 4234	5
4237-4238	17, 18
4240	17, 20
4242	17, 18
4243	12
55 Fed. Reg. 50148-50	5
FEDERAL RULES OF APPELLATE PROCEDURE:	
Rule 28(j)	9
LEGISLATIVE MATERIALS:	
H.R. Rep. No. 121, 102d Cong., 1st Sess. (1991)	7
S. Rep. No. 104, 102d Cong., 1st Sess. (1991)	8
Conf. Rep. No. 282, 102d Cong., 1st Sess. (1991)	8, 29

TABLE OF AUTHORITIES—Continued

	Page
S. Rep. No. 1445 (January 26, 1931)	10
Hearings Before the Subcommittee on Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Committee on Appropriations, 102d Cong., 1st Sess. 1162 (1991)	6
137 Cong. Rec. H1526 *et seq.* (Daily ed. March 7, 1991)	26, 27
137 Cong. Rec. H1533 (Daily ed. March 7, 1991)	21
137 Cong. Rec. S3544 *et seq.* (Daily ed. March 19, 1991)	21
137 Cong. Rec. S3627 *et seq.* (Daily ed. March 20, 1991)	21, 27
137 Cong. Rec. H5131 (Daily ed. June 26, 1991)	7
137 Cong. Rec. S12848-99, S12914 (Daily ed. Sept. 12, 1991)	8
137 Cong. Rec. H9418-67 (Daily ed. Nov. 6, 1991)	8
137 Cong. Rec. H10491-10508 (Daily ed. Nov. 19, 1991)	8
137 Cong. Rec. H10856 (Daily ed. Nov. 22, 1991)	9
137 Cong. Rec. S17782 (Daily ed. Nov. 22, 1991)	9
MISCELLANEOUS:	
All Agency Memorandum No. 161 (U.S. Department of Labor, January 29, 1992)	6
Handbook of Practice of the United States Court of Appeals for the District of Columbia, ¶ IX (8)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. ——

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners,

v.

LYNN MARTIN, SECRETARY OF LABOR, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

The Building and Construction Trades Department, AFL-CIO and its fifteen affiliates, including the Laborers' International Union of North America, AFL-CIO, petition this Court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the judgment in *Building and Construction Trades Department ,et al., v. Martin, et al.*, 961 F.2d 269 (D.C. Cir. 1992).

OPINIONS BELOW

The decision of the District of Columbia Circuit has been published at 961 F.2d 269 (D.C. Cir. 1992) and is reprinted as Appendix A in the separately bound Appendix ("App.") to this certiorari petition. App. 1a-15a. The decision of the United States District Court for the District of Columbia is published at 116

Lab. Cas. (CCH) ¶ 35,395 (D.D.C. 1990) and is reprinted as Appendix C. App. 60a-71a. Other decisions below include the decision of the District of Columbia Circuit published at 712 F.2d 611 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984), reprinted as Appendix B. App. 16a-59a; the original decision by the United States District Court for the District of Columbia, published at 553 F.Supp. 352 (D.D.C. 1982), reprinted as Appendix D. App. 72a-78a; the decision of the United States District Court for the District of Columbia upon remand from the District of Columbia Circuit, published at 102 Lab. Cas. (CCH) ¶ 34,648 (1984), reprinted as Appendix G. App. 101a-103a; and the decision of the District Court for the District of Columbia denying petitioners' motion for a stay pending appeal, which is not published, reprinted as Appendix F. App. 98a-100a.

JURISDICTION

The order and judgment of the District of Columbia Circuit were entered on April 21, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Davis-Bacon Act, as amended, 40 U.S.C. §§ 276a-276a-5; Section 303 of the Dire Emergency Supplemental Appropriations for Consequences of Operation Desert Shield/Desert Storm, Food Stamps, Unemployment Compensation Administration, Veterans Compensation and Pensions, and Other Urgent Needs Act of 1991, Pub. L. No. 102-27, 105 Stat. 130-160 (April 10, 1991); and Sections 553 and 706 of the Administrative Procedures Act, as amended, 5 U.S.C. § 553, § 706, are reprinted in Appendix CC. App. 520a-526a.

STATEMENT OF THE FACTS AND THE CASE

This case involves a dispute over the legality of regulations promulgated by the Secretary of Labor that permit expanded use of classifications of unskilled and semi-

skilled construction workers called "helpers" on government-funded construction projects subject to the prevailing wage requirements of the Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5. App. 520a-522a.

1. The First Helper Regulation

Under the Davis-Bacon Act, the Secretary of Labor is directed to determine the prevailing local wage rates for the "various classes of laborers and mechanics" engaged in the performance of federal and federally-assisted construction contracts. 40 U.S.C. § 276a *et seq.* App. 520a-522a.

In May, 1982, the United States Department of Labor ("DOL") published revised regulations implementing the Davis-Bacon Act and the labor standards provisions in other federal statutes that incorporate the Davis-Bacon prevailing wage setting technique, referred to as the "Related Acts." These regulations included, *inter alia*, new provisions intended to allow expanded use of "helpers" on Davis-Bacon projects. 47 Fed. Reg. 23644, 23658 (May 28, 1982). App. 181a, 232a. Specifically, the 1982 regulations, through a definition of the term "helper", sought to reverse longstanding DOL practice by allowing some overlap between the duties of helpers and higher-paid journeymen and laborers. The 1982 regulations provided further that a helper classification would need to be only "identifiable", rather than "prevailing", in an area in order to be included in a Davis-Bacon wage determination. App. 194a-196a, 202a-209a, 224a, 236a-239a, 250a-257a, 271a, 277a.

2. The First Court of Appeals Decision

The Building and Construction Trades Department, the AFL-CIO, and its affiliated national and international unions, including the Laborers' International Union of North America (hereinafter "the Building Trades, *et al.*") challenged several of the May, 1982 regulations, including the "helper" regulations. The district court issued a permanent injunction in *Building and Construction Trades Department, AFL-CIO v. Donovan*, 553 F.

Supp. 352 (D.D.C. 1982) (App. 72a-78a), prohibiting the Secretary of Labor from implementing all but one of the challenged regulations. The Secretary appealed the district court's ruling; the court of appeals, reversing much of the district court's ruling, upheld the Secretary's new definition of "helper" that provided for a helper to perform overlapping duties of higher-paid journeymen and laborers. *Building and Construction Trades Department, AFL-CIO v. Donovan*, 712 F.2d 611 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984). App. 16a-59a.

Nevertheless, the court of appeals affirmed the district court's order blocking the portion of the Secretary's regulations that would have permitted issuing a wage determination for a helper classification where "identifiable" in a locality, and ruled that such clasifications could only be issued where they are found to be "prevailing" in the area. 712 F.2d at 624-626. App. 36a-54a. Upon remand, the district court vacated the injunction on the helper definition, which is now codified at 29 C.F.R. § 5.2(n)(4) (App. 271a), but continued the injunction with respect to the remaining helper regulations. *Building and Construction Trades Department, AFL-CIO, et al. v. Donovan*, 102 Lab. Cas. (CCH) ¶ 34,648 (D.D.C. 1984). App. 101a-103a. The district court's December 21, 1984, order stated that the Secretary could later submit reissued regulations concerning helpers, and the rules would be approved if they conformed to the court of appeals' decision.

3. The Second Helper Regulation

Three years later, the Secretary issued a revised proposal, asking for comment on five alternative methodologies attempting to determine when "helper" classifications "prevail" in a locality. None of the proposed methodologies took into account the prevailing practices of "various classes of laborers . . .". 40 U.S.C. § 276a. App. 520a. *See*, 52 Fed. Reg. 31366. App. 155a-180a. No further action on this second "helper" proposal was taken during the remaining eighteen months of the Reagan Administration.

The rule challenged in this proceeding, the second "helper" rule, was promulgated on January 27, 1989, immediately following the inauguration of President Bush, by then-Acting Secretary of Labor Dennis E. Whitfield during the transition between administrations. 54 Fed. Reg. 4234. App. 115a. The Acting Secretary moved the district court to vacate its still-outstanding injunction of the first helper regulation, dating from 1984, so that the newly adopted helper regulations could be implemented. 54 Fed. Reg. 4234-4244 (January 27, 1989). App. 115a-154a.

4. The Second District Court Decision

The district court granted the Secretary's motion to vacate the injunction, over opposition from the Building Trades, *et al. Building & Constr. Trades Dep't v. Dole*, 29 Wage & Hour Cas. (BNA) 1607, 116 Lab. Cas. (CCH) ¶ 35,395 (D.D.C. 1990). App. 60a-71a. In its September 24, 1990, Order, the district court concluded that the revised "helper" regulations met the requirements of the Davis-Bacon Act, and were consistent with the court of appeals' 1983 decision.

The Secretary then published a Notice that the new "helper" regulations would become effective on February 4, 1991. 55 Fed. Reg. 50148-50 (December 4, 1990). App. 104a-114a. The Building Trades, *et al.*, asked the district court to issue an injunction pending appeal, in order to preserve the status quo. The District Court denied the motion on January 20, 1991. *Building and Construction Trades Department, et al. v. Dole*, Case No. 90-5345 (D.D.C. January 30, 1991). App. 98a-100a. As a result, the new "helper" regulations became effective on February 4, 1991.

5. The Dire Emergency Supplemental Appropriations Act of 1991

On April 10, 1991, President Bush signed into law the Dire Emergency Supplemental Appropriations For Consequences of Operation Desert Shield/Desert Storm, Food Stamps, Unemployment Compensation Administration,

Veterans Compensation and Pensions, and Other Urgent Needs Act of 1991 ("Dire Emergency Supplemental Appropriations Act"), Pub. L. No. 102-27, 105 Stat. 130 *et seq.* App. 523a. Section 303 of the Dire Emergency Supplemental Appropriations Act provides in relevant part that:

> *Notwithstanding any other provision of law, no funds shall be expended by the Secretary of Labor to implement or administer* the regulations published at 54 Federal Register 4234-44 (January 27, 1989) to be codified at 1.7(d), 5.2(n)(4), 5.5(a)(1)(ii)(A) and 5.5(a)(4)(iv) of Title 29 of the Code of Federal Regulations to implement or administer any other regulation that would have the same or similar effect[.]

(Emphasis added.)

Pursuant to the mandate in Section 303 of the Dire Emergency Supplemental Appropriations Act, the Secretary of Labor temporarily refrained from implementing the helper regulations, until President Bush signed the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1992, Pub. L. 102-170 (hereafter "Labor-HHS 1992 Appropriations Act") into law on November 26, 1991.[1]

6. The Labor-HHS 1992 Appropriations Act

While the appeal of the "helper" regulation was pending before the court of appeals, the Department of Labor's proposed 1992 Budget was submitted to the Congress. It included a specific request for $750,000 and 13 full-time employees (hereafter "FTE's") for DOL's Employment Standards Administration ("ESA"). The funds and staff were designed to implement the new helper regulation.[2]

---

[1] After the end of fiscal year 1991, the Secretary implemented the helper regulation. All Agency Memorandum No. 161 (U.S. Dept. of Labor, January 29, 1992).

[2] Hearings Before the Subcommittee on Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Committee on Appropriations, 102d Cong., 1st Sess. 1162, 1210 and 1214 (1991). App. 387a-395a.

The House Committee on Appropriations specifically denied DOL's request, explaining that:

> The committee has been informed by the Department of Labor that it is in compliance with the *permanent prohibition contained in the Dire Emergency Supplemental Appropriations Act of 1991 concerning implementation of the Davis-Bacon helper regulations.* The committee believes therefore that the Department of Labor's request for additional funding to implement the Davis-Bacon helper regulations is unnecessary. *Section 303 of the Dire Emergency Supplemental Appropriations Act of 1991 (P.L. 102-27) permanently prohibits the Secretary of Labor from expending any funds to implement or administer the helper regulations.*

H.R. Rep. 121, 102d Cong., 1st Sess. 17 (1991) (emphasis added). App. 398a. The House of Representatives passed the Labor-HHS 1992 Appropriations Act on June 26, 1992. 137 Cong. Rec. H5131 (daily ed. June 26, 1992).

Similarly, the Senate Committee on Appropriations denied DOL's request for funds and staff to implement the helper regulations. However, the Senate version of the appropriations act differed from the House version in one important respect. While both the House and Senate versions expressed the permanency of the spending ban, the Senate version specifically excised the $750,000 from the DOL budget request. The report explained that:

> A requested increase of 13 FTE's and $750,000 is denied the Wage and Hour Program *reflecting the permanent prohibition on implementation of the Davis-Bacon helper regulations enacted in section 303 of Public Law 102-27.* The Committee has been informed by the Department of Labor that it is in compliance with the permanent prohibition contained in the Dire Emergency Supplemental Appropriations Act of 1991 concerning implementation of the Davis-Bacon helper regulations. The Committee believes, therefore, that the Department of Labor's request for

> additional funding to implement the Davis-Bacon helper regulations is unnecessary.

S. Rep. No. 104, 102d Cong., 1st Sess., 19-20 (1991). App. 402a-403a. The Senate passed the Labor-HHS 1992 Appropriations Act on September 12, 1991. 137 Cong. Rec. S12848-99, S12914 (daily ed. Sept. 12, 1991).

Thereafter, on November 1, 1991, the Conference Committee appointed to reconcile the House and Senate versions of the Labor-HHS 1992 Appropriations Act agreed to adopt the Senate's lower spending figure. Its report explained that the $750,000 in funds appropriated to ESA and the denial of DOL's request for 13 FTE's needed to administer the helper regulation "reflects the permanent prohibition on implementation of the Davis-Bacon helper regulations enacted in section 303 of Public Law 102-27." Conf. Rep. No. 282, 102d Cong., 1st Sess. 17 (1991). App. 406a.[3]

Congress adopted the Conference Committee's version of the Labor-HHS 1992 Appropriations Act, with its elimination of any funds for implementing the helper regulations and its declaration of the permanency of the spending ban of the earlier Dire Emergency Supplemental Appropriations Act. 137 Cong. Rec. H9418-67 (daily ed. Nov. 6, 1991). On November 9, 1991, President Bush vetoed the Labor-HHS 1992 Appropriations Act because it provided funding for abortion counselling. 137 Cong. Rec. H10491 (daily ed. Nov. 19, 1991). The House of Representatives failed to override the President's veto. 137 Cong. Rec. H10491-10508 (daily ed. Nov. 19, 1991). Congress then deleted the abortion counselling provision from the bill. The Act was unchanged in all other respects, and reflected the deletion of the $750,000 (and 13 FTE's) requested by DOL to implement

---

[3] The appendix to the Conference Report sets forth "the amounts agreed to for each program, project or activity with appropriate comparisons." The $750,000 reduction is reflected in the overall $231,326,000 ESA appropriation. *See* App. 401a.

the new helper regulation. 137 Cong. Rec. H10856 (daily ed. Nov. 22, 1991) (App. 409a-410a) and 137 Cong. Rec. S17782 (daily ed. Nov. 22, 1991). App. 411a-412a. The same Congress for the third time then voted to permanently bar implementation of the helper regulation.

On November 26, 1991, President Bush signed the Labor-HHS 1992 Appropriations Act as Pub. Law 102-170.

7. The Second Court of Appeals Decision

The Building Trades, *et al.*, in their appeal from the district court's decision to vacate its injunction, argued that Section 303 operates permanently to repeal the Secretary of Labor's authority to implement the new helper regulations. On December 3, 1991, pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure and ¶ IX(8) of the Handbook of Practice of the United States Court of Appeals for the District of Columbia Circuit, the Building Trades, *et al.* submitted a letter bringing to the court of appeals' attention the legislative developments concerning the Secretary of Labor's 1992 Budget Request.

Thereafter, on April 26, 1992, the court of appeals, in *Building and Construction Trades Dep't v. Martin*, 961 F.2d 269 (D.C. Cir. 1992), affirmed in part and reversed in part the district court's order vacating the 1982 injunction against implementation of new "helper" regulations under the Davis-Bacon Act. The court of appeals, *inter alia*, rejected the challenge by the Building Trades, *et al.* to the Secretary's authority to implement the new "helper" regulation based on the fact the Section 303 rider to the Dire Emergency Supplemental Appropriations Act of 1991 prohibited the Secretary from spending funds to implement the helper regulation. App. 7a-10a. The court also determined that the tests for prevailing use of helpers and the definition of helper were consistent

with the Act and the court's 1983 decision. *Id.* at 274-76. App. 10a-15a.

REASONS FOR GRANTING THE WRIT

I. THE IMPORTANCE OF THE STATE INTERESTS AND LABOR RELATIONS INTERESTS AT ISSUE

The Davis-Bacon Act is one of our nation's oldest labor statutes, originally enacted in 1931 and amended in its present form in 1935. Prevailing wage laws, many modeled after the federal law, exist in thirty-one states. The Davis-Bacon Act has bipartisan roots[4] and has enjoyed bipartisan support since its enactment by Congress. During the course of the last sixty-one years, Congress has expanded its coverage to over sixty related statutes which provide federal funding or assistance to construction.[5] In so doing, Congress continually has recognized the critically important role of the Davis-Bacon Act in the nation's economy through its protection of the wages and fringe benefits of hundreds of thousands of construction workers, and through ensuring that qualified construction contractors perform federal construction contracts in a safe and efficient manner. *See, Universities Research Ass'n v. Coutu*, 450 U.S. 754, 776 (1981); *Walsh v. Schlect*, 429 U.S. 401, 411 (1977); *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 178 (1954). Indeed, at any

[4] The Davis-Bacon Act was originally sponsored by Republican Senator James Davis and Republican Representative Robert Bacon and was signed into law by President Herbert Hoover. *See* S. Rep. No. 1445 (January 26, 1931).

[5] The Davis-Bacon Act itself applies only to construction contracts directly with the federal government. However, Congress recurrently has included Davis-Bacon protections in other statutes that provide federal funding for construction activities to other entities like state and local governments, or grantees. A list of these statutes, referred to as the "Davis-Bacon Related Acts," may be found at 29 C.F.R. § 5.1 (1991). App. 261a-266a.

one time, the Davis-Bacon Act applies to "[s]ome 600,000 contracts" and "approximately $43 billion is spent annually for construction work covered by these statutes [the Davis-Bacon and Related Statutes]." 543 F. Supp. at 1291. App. 95a.

Most of the four million laborers and mechanics represented by the Building Trades, *et al.*, in the construction industry are employed, from time to time, on these federal and federally-assisted construction projects covered by the Davis-Bacon and Related Acts. Affidavit of Robert Georgine at ¶ 2, App. 432a (hereafter "Georgine Aff."). The consequences of this case are immediate and profound for these working men and women. Many of these laborers and mechanics currently employed on federally funded construction projects will be forced to accept lower "helper" wages. Affidavit of John T. Dunlop at ¶ 8, App. 476a (hereafter "Dunlop Aff."); and Affidavit of George A. Miller at ¶¶ 9-18, App. 444a-446a (hereafter "Miller Aff."). Other journeymen and laborers will lose employment opportunities as contractors bidding for new construction contracts substitute lower-paid helpers for experienced workers. Miller Aff. at ¶ 18, App. 446a. Dunlop Aff. at ¶ 11, App. 477a. And, finally, many contractors employing laborers and mechanics represented by the Building Trades Department, *et al.* will be unable or unwilling to compete for federally funded construction projects because they are bound by collective bargaining agreements which do not permit employment of "helpers," or because they are concerned about their ability to provide quality construction if they employ poorly-trained or untrained semi-skilled or unskilled "helpers" to perform tasks formerly performed by skilled mechanics. Miller Aff. at ¶ 17-22, App. 445a-447a. The result will be a drastic reduction of employment opportunities for workers employed by these contractors. For this reason alone, this case warrants this Court's attention.

II. THE DECISION BELOW CONFLICTS WITH THE DAVIS-BACON ACT BECAUSE IT DOES NOT TAKE INTO CONSIDERATION THE "VARIOUS CLASSES OF LABORERS . . ."

The Building Trades, *et al.*, and most particularly the Laborer's International Union of North America, demonstrated to the court of appeals that, in fact, the newly-adopted regulation would result in the wholesale substitution of helpers for laborers who work under the supervision of journeymen mechanics and that "laborers", the very class of workers that will be displaced most often by lower-paid helpers, were nowhere considered by the Secretary. In upholding a helper regulation that does not take into account the prevailing practices of "various classes of laborers . . ." (40 U.S.C. § 276a) (App. 520a), the decision below violates the Davis-Bacon Act. The Secretary's methodology which the court of appeals approved is nothing more than the "identifiable" standard which the first court of appeals decision held violated the Davis-Bacon Act's requirement that "mechanics and laborers" on federal and federally-assisted construction be paid the "prevailing" wage in the locality in which they are employed. 712 F.2d at 624-626. App. 40a-46a.

Under the "helper" rule before this Court, the Secretary now will use two alternative methodologies for determining whether the use of "helpers" should be recognized as a "prevailing" local practice. 29 C.F.R. § 1.7(d)(1), (2); 54 Fed. Reg. 4243. App. 150a-152a.[6] Neither

[6] The Secretary's methodology provides:

> If the prevailing wage for a particular journeyman classification is a wage that is paid to the majority of the journeymen in the classification as defined in § 1.2(a)(1) of this part, *then the practice followed by those contractors whose rates are adopted as prevailing for the journeyman* shall also be deemed the prevailing practice in determining whether to issue a helper classification. App. 151a.

It further provides:

methodology counts "laborers", the most numerous construction classification and the very classification which is most likely to be performing the duties now to be assigned to helpers. *See* Affidavit of Carl Booker at ¶ 5-17, App. 446a-473a (hereafter "Booker Aff."); and Affidavit of James Warren at ¶ 30-41, App. 461a-464a (hereafter "Warren Aff."). The first methodology is used by the Secretary to determine whether the use of "helpers" "prevails" in union-dominated areas. Under the rule, in union-dominated areas the Secretary will recognize a "helper" classification in collective bargaining agreements of contractors whose union *journeyman* classifications are found to prevail, even if the employment of the "helper" job title is *de minimis* and if the *prevailing practice* among contractors is to hire union laborers to perform the semi-skilled work of assisting journeymen. The recognition of non-prevailing helper classes will occur because the Secretary's methodology completely fails to consider the wage data derived from laborers employed by contractors in the locality. 29 C.F.R. § 1.7(d)(1). App. 151a.

The second methodology provides a formula for determining whether to recognize a "helper" classification in localities where the "weighted average" method is used. Generally, these are situations where no single wage rate accounts for a majority of the laborers or mechanics in each individual trade. Under this methodology, the Sec-

---

> If the prevailing wage for a particular journeyman classification is the average of the wages paid to the journeymen, weighted by the total numbers of journeymen in the classification . . . , then *the total number of workers* in the classification employed by contractors utilizing helpers (*journeymen plus apprentices, trainees, and helpers* . . .) on reported projects *will be compared to the total number of workers in the classification* employed by contractors not utilizing helpers (*journeymen plus apprentices and trainees* . . .) and the practice which covers the majority of such workers shall be deemed the prevailing practice. . . . App. 151a-152a.

retary's rule compares two groups of contractors: the contractors who hire helpers (generally, nonunion contractors), compared against the contractors who do not hire helpers (generally, union contractors). On the nonunion side, the Secretary counts the total number of journeymen, apprentices, trainees and helpers, while on the union side she counts the total of journeymen, apprentices and trainees. App. 132a-139a. *Under the regulation, laborers are not counted*, even where they may be the prevailing craft in the area performing semi-skilled work under the direction of local journeymen. App. 129a-131a.

Because the "various classes of laborers . . ." are left out of this methodology, the rule will inevitably recognize a low-wage "helper" classification even where the use of helpers does not prevail. The methodology, therefore, must result in underclassification and underpayment of laborers on projects covered by Davis-Bacon provisions, in plain violation of the statutory mandate and the court of appeals' first decision that workers be paid no less than locally prevailing rates. *See U.S. v. Binghamton Const. Co.*, 347 U.S. 171 (1954); 712 F.2d at 625. It flies in the face of the statutory command that the Secretary determine prevailing wages for "various *classes* of *laborers* and mechanics." 40 U.S.C. § 276a. "Laborers" by fiat will be written out of the statute and replaced by "classes of helpers." The Secretary cannot defeat the letter of the statute through regulatory redefinition. *See, e.g., Fertilizer Institute v. U.S. Environmental Protection Agency*, 935 F.2d 1303, 1309 (D.C. Cir. 1991).

III. THE DECISION BELOW CONFLICTS WITH THE DOCTRINE OF THIS COURT, AND MISAPPLIES THE ADMINISTRATIVE PROCEDURES ACT, BY UPHOLDING A RULE THAT IS NOT SUPPORTED BY THE RECORD, AND WHICH IS JUSTIFIED MERELY BY AN ASSERTION OF THE SECRETARY'S "EXPERIENCE"

Since the helper regulation first was proposed in 1982, the Secretary has been unable to articulate a rational underpinning for the rule's impact on construction laborers.[7] From the beginning, the Secretary interpreted the new helper classification to be one that encompassed some of the duties of both laborers and journeymen. As a result, the rule would allow contractors to assign laborers' duties to lower-paid helpers:

---

[7] The record in this rulemaking shows that construction laborers traditionally perform semi-skilled work; directly assist skilled journeymen and commonly earn a higher wage than "helpers". Administrative Record 000277-000749 ("Ad. Rec."). *See* "General Wage Determinations issued under the Davis-Bacon Act (U.S. Dept. of Labor, 1987). App. 479a-519a. The work of the laborer overlaps substantially the work of the "helper" and the defintion of a "helper" is so broad that it can include virtually any of the duties of a journeyman or laborer. *Infra*, n. —. The "laborer" job classification has ancient roots, generally including all the workers on the job who were not within the skilled trades as "masters," "journeymen" and "apprentices." Their work includes a variety of components, including "serving" the skilled trades—preparing work areas for journeymen, hauling supplies to journeymen, mixing materials such as mortar or plaster, positioning materials, etc. This "serving" component of laborers' duties is known in the industry as "tending" or "helping" the skilled journeyman. *See* Dunlop Aff. ¶ 15, App. 428a-429a.; Booker Aff. ¶ 5-8, App. 466-468a; Warren Aff. ¶ 30-40, App. 461a-463a; Miller Aff. ¶ 8-20, App. 443a-446a. These duties are specifically listed in the Secretary's new definition of a "helper" as a worker "[who] performs a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and holding materials or tools . . ." 29 C.F.R. § 5.2 (n)(4). App. 152a-153a.

> Once the helper regulation is in effect, the more likely situation is one in which helpers would in some instances replace laborers as well as journeymen . . . *This puts the average estimate [of cost savings] at $363.16 million assuming that helpers, in fact, replace both laborers* and journeymen. This estimate also represents our "best guess" about the likely impact of the final regulation.

47 Fed. Reg. 23651 (emphasis added). App. 209a.

All parties relied upon the Secretary's construction of the rule throughout both administrative rulemaking proceedings. In fact, the certainty that low-wage helpers would be substituted for higher-paid laborer was so self-evident to everyone involved in the construction industry that it was unquestioned. The overlap in the duties of helpers and laborers was freely acknowledged by the largest construction employer group in the nation. Ad. Rec. 000036. The first court of appeals decision also understood that low-wage helpers would displace laborers. 712 F.2d at 626. App. 44a.

The second "helper" rulemaking was initiated August 9, 1987, when the Secretary issued five proposed, alternative methodologies for determining when classifications of helpers are "prevailing" in a locality. 52 Fed. Reg. 31366-67. App. 158a-161a. Once again, each of the five alternative proposals was interpreted as allowing helpers to perform laborers' duties, and the preamble to the second proposed rule stated that "where it has been determined that helpers prevail, *helpers will substitute for laborers* as well as journeymen." 52 Fed. Reg. 31370 (emphasis added). App. 171a-173a. The Secretary calculated annual cost savings under the 1987 proposal of $532 million ("midpoint savings"), explaining that half of the allowable helpers would substitute for journeymen, and half would substitute for laborers. 52 Fed. Reg. 31370. App. 172a. However, *none* of the options provided a methodology under which the prevailing practices of laborers would be taken into account.

In the 1987 comments of the Laborers' Union on the five proposed, alternative methodologies, its central objection to all options was that each failed to count wage data of laborers when determining whether the use of helpers prevailed in the locality. Ad. Rec. 00229-00275. App. 123a-124a. Because the record showed that helpers will substitute for laborers, and because the Secretary's regulatory impact analysis predicted cost savings based on low-wage helpers substituting for laborers, the Laborers' Union pointed out that it was both illogical and contrary to the Davis-Bacon Act not to count the wage data of laborers when determining whether the use of "helpers" is prevailing practice. Ad. Rec. 000229-000233, 000271-000275. App. 123a-124a.

When the second final helper rule was issued, the Secretary still did not devise a methodology that would consider the wage data of "various classes of laborers . . ." as required by Davis-Bacon Act. Instead, the Secretary did a complete turn about, capriciously adopting a rationale for her rule that never had been articulated in the rulemaking process. Without any notice to the parties, the Secretary suddenly abandoned her longstanding interpretation of the rule, and asserted that the wage data of laborers need not be considered when determining whether "helpers" prevail. 54 Fed. Reg. 4237-4238; 4240; 4242. App. 128a-130a, 138a, 146a-148a.

The sudden and unsupported reversal in the Secretary's analysis of the rule's effect on laborers also compelled a change in the Secretary's regulatory impact analysis. 54 Fed. Reg. 4242. App. 146a-147a. Whereas the Secretary consistently had asserted since 1982 that the projected savings from implementing a "helper" rule would be produced by substituting low-wage helpers for higher-paid laborers, her changed "understanding" of the structure of the construction industry compelled her to conclude that

> it is highly unlikely that helpers will substitute for laborers as the Preliminary Regulatory Impact Analysis ("PRIA") suggested may occur . . . Accordingly,

> *the Department is withdrawing the portion of the analysis which contains estimates of cost savings for where helpers substitute for both laborers and journeymen.*

54 Fed. Reg. at 4237-4242 (emphasis added). App. 146a-147a.

Agency rulemaking must be supported by the administrative record. 5 U.S.C. § 553. However, there is no evidence of any kind anywhere in the record to support the Secretary's mistaken premise that laborers do not perform the duties of helpers, or her erroneous assertion that there will be no substitution of helpers for laborers. In fact, the record shows just the opposite. *See*, "General Wage Determinations issued under the Davis-Bacon and Related Act," U.S. Department of Labor (January 2, 1987) Ad. Rec. 000277-000749 and 000036. App. 479a-518a. In lieu of evidence in the record, the Secretary cites only her "experience":

> [I]t has been *our experience* . . . that prevailing pay relationships . . . [are] in direct proportion to skill levels, and semi-skilled helper rates are above the unskilled laborer's rate. . . . Thus, there will be no economic incentive for contractors to replace laborer with helpers.

54 Fed. Reg. 4242 (emphasis added). App. 147a. *See also* App. 138a.

Judicial review of an agency's action must be evaluated "solely by the grounds invoked by the agency," with the agency articulating a "rational connection between the facts found and the choice made." *SEC v. Chenery Corp.*, 332 U.S. 783 (1947); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*, 463 U.S. 29 (1983); *Bowen v. American Hospital Ass'n*, 476 U.S. 610 (1986). Here, the sole ground invoked by Secretary is her "experience," with no attempt to tie her rule to the record.

The failure of the Secretary to rely upon record evidence and to offer a rational basis for her rulemaking warrants this Court's attention. When an agency's rule is not sup-

ported by the record, it is deficient under the standards of the Administrative Procedures Act and must be rejected. *Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1095, 1124 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 227 (1985). This Court's doctrine on this issue is uncompromising. Standing alone, the failure of the Secretary to explain her regulation based on the administrative record is sufficient to invalidate the rule. *Chenery, supra.* Rejection of such a rule is even more compelling where the record, as here, flatly contradicts the Secretary's rationale. *Motor Vehicles Mfrs. Ass'n, supra* at 42 (agency regulation is arbitrary and capricious if the agency has offered an explanation that runs counter to the evidence before it.).

IV. THE DECISION BELOW CONFLICTS WITH THE DOCTRINE OF THIS COURT UNDER THE ADMINISTRATIVE PROCEDURES ACT THAT THE REVIEWING COURT MAY NOT RELY UPON COUNSEL'S POST HOC RATIONALIZATION OF A RULE

When *promulgating* the "helper" rule, the Secretary was obligated to provide a rational explanation for the rule based on the record. 5 U.S.C. § 553. App. 524a. In *reviewing* the Secretary's regulation, the court of appeals was obligated to examine the sufficiency of the regulation based solely on the rationale offered by the Secretary in the rule itself. *Bowen v. Georgetown University Hospital, et al.*, 488 U.S. 204, 212-13 (1988)

In instances like the "helper" regulation, where the Secretary has failed to offer a rational explanation of the rule at the time of the rulemaking, a court is precluded from relying on *post hoc* explanations offered by counsel. *Id.* ("Courts may not accept . . . counsel's post hoc rationalizations for agency [orders]."; *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1982). However, the court below committed exactly this error.

The Secretary's "helper" rule is precise in identifying which workers will be counted for purposes of determining whether a "helper" classification is found to "pre-

vail." 29 C.F.R. § 1.7(d)(1) and (2). App. 151a-152a. The rule includes no provision for counting laborers in its methodology. This applies both in union-dominated and non-union areas, where the Secretary's methodology counts "all workers who work in a classification (all journeymen, helpers, apprentices and trainees)", but *no laborers*. 54 Fed. Reg. 4240. App. 138a.

Athough the rule itself provided no mechanism to account for laborers, the Secretary's counsel attempted *post hoc* to provide an explanation for this omission. In its review of the rule, the court below incorrectly looked to counsel's *post hoc* arguments to find a rational basis for the regulation, opining that "the proposal . . . would give full weight to the wages normally paid to unionized laborers when calculating the prevailing wage paid to helpers." App. 138a.

However, the court did not look to the *rule itself* to justify this key assertion, nor could it—because the rule does not account for laborers. Instead, the court points only to the *post hoc* arguments of the Secretary's counsel, with the court citing as its authority the "Brief of Appellees Secretary of Labor, *et al.*" App. 12a. Sole reliance on the *post hoc* rationalizations of counsel conflicts with the standards set by this Court, requiring that an agency must provide a justification for its rulemaking within the context of the rule itself.

V. THE DECISION BELOW CONFLICTS WITH TWO RECENT APPROPRIATIONS ACTS OF CONGRESS WHICH PERMANENTLY PROHIBIT THE SECRETARY OF LABOR FROM EXPENDING FUNDS TO "IMPLEMENT" THE HELPER REGULATION OR ANY OTHER REGULATION "WITH THE SAME OR SIMILAR EFFECT"

A. Dire Emergency Appropriations Act of 1991

Following the Secretary of Labor's Notice that she intended to implement the new helper regulations on February 4, 1991, Congress overwhelmingly voted to pro-

hibit her from using any funds to implement such regulations or "any other regulations that would have the same or similar effect." [8] App. 12a.

Section 303 operates permanently to repeal the Secretary's authority to implement her new helper regulation. When Congress chooses to use an appropriations act as a vehicle for substantive legislation, courts are "bound to follow Congress's last word on the matter," as Congress "could accomplish its purpose by an amendment to an appropriations bill, or otherwise." *Los Angeles v. Adams*, 556 F.2d 40, 49 (D.C. Cir. 1977) (*quoting United States v. Dickerson*, 310 U.S. 554, 555 (1940)); *see also, Friends of the Earth v. Armstrong*, 485 F.2d 1, 9 (10th Cir. 1973), *cert. denied sub nom. Friends of the Earth v. Stamm*, 414 U.S. 1171 (1974). Therefore, where Congress incorporates a direct prohibition against the use of moneys for a particular purpose into an appropriations act, the prohibition will have the same force and effect as other statutory law. *Adams*, 556 F.2d at 49; *Armstrong*, 485 F.2d at 9; *National Treasury Employees Union v. Devine*, 577 F. Supp. 738, 750 (D.D.C. 1983), *aff'd*, 733 F.2d 114 (D.C. Cir. 1984). Moreover, when Congress modifies a statute by an appropriations measure, the agency administering the statute is required to effectuate the original statutory scheme as much as possible, within the limits of the added constraint. *Adams*, 556 F.2d at 50.

The courts have long recognized that a restriction attached to an appropriations bill is interminable in duration if the statutory language and legislative history indicate that it is intended to be made permanent law. *Elizabeth Norcross*, 142 Cl. Ct. 763, 766 (1958). The court in *Norcross* explained:

---

[8] Motions to delete Section 303 from the Dire Emergency Supplemental Appropriations Act were defeated in the House of Representatives by a margin of 244 to 173, and the Senate by 63 to 37. *See*, 137 Cong. Rec. H1533 (daily ed. March 7, 1991), (App. 314a); 137 Cong. Rec. S3544 (daily ed. March 19, 1991), (App. 321a-365a); 137 Cong. Rec. S3632 (daily ed. March 20, 1991), (App. 385a-386a).

> Then, too, even permanent legislation may be attached to an appropriation bill, and if no point of order is made against it before passage in the House, or if a special rule makes it in order, it becomes permanent legislation. But in that event it is usually accompanied by wording such as will show it to be permanent legislation.

142 Cl. Ct. at 768.

Both the statutory language of Section 303 of the Dire Emergency Supplemental Appropriations Act and its underlying legislative history lead to the conclusion that Congress intended to repeal permanently the Secretary's authority to implement the helper regulation.

An important indication of the permanency of a restrictive provision in an appropriations act is whether the provision under review is of a general nature that bears no relation to the objects or purpose of the appropriations in the act. *See, e.g., Matter of Federal Judges IV*, 65 Comp. Gen. 352 (1986); *Matter of Permanency of Weapons Testing Moratorium*, 65 Comp. Gen. 588 (1986). This is the case with regard to Section 303 of the Dire Emergency Supplemental Appropriations Act, which appropriates no funds to the Employment Standards Administration of the Department of Labor (the division charged with administering the Davis-Bacon Act), thereby compelling the conclusion that Section 303 was not intended to regulate the expenditure of funds appropriated under the act to which it is attached, but was intended instead to bar permanently the use of *any funds* "to implement the helper regulations." App. 523a.

Section 303 is found in Title III, the General Provisions title, of the Dire Emergency Supplemental Appropriations Act. App. 523a. Title III contains no Labor Department appropriations. Indeed, nowhere in the Dire Emergency Supplemental Appropriations Act are there general ap-

propriations for the Labor Department.[9] Because the Secretary is in no way dependent upon the receipt of funds under the Dire Emergency Supplemental Appropriations Act to enforce provisions of the Davis-Bacon Act, the ban on implementing the helper regulation is not tied to the life of that Act.

The court of appeals addressed this contention in *Building and Construction Trades Department, AFL-CIO, et al. v. Martin*, as follows:

> It is true, as the unions note, that the General Accounting Office (the "GAO"), in its publication, GAO, *Principles of Federal Appropriations Law*, recognizes that the absence of any appropriation for the purpose limited by the rider is some indication of permanence. *Id.* at 2-34—2-37. However, while the absence of such an appropriation may be useful in ascertaining congressional intent, standing alone it is not enough to indicate permanence. As the GAO has also stated, "the presence or absence of words of futurity remains the crucial factor, and the additional factors have been used for the most part to support a conclusion based primarily on this presence or absence." *Id.* at 2-37. Similarly, as GAO has explained, "a proviso or general provision [in an appropriations act] that does not contain words of futurity will generally not be construed as permanent." *See id.* at 2-34—2-35. Principally, courts have recognized that when Congress intends a provision in an appropriations bill to have permanent effect, it uses words of permanency

---

[9] The only appropriations related to the Labor Department are specific appropriations of $150 million for the Unemployment Trust Fund for state unemployment insurance administration, and $4 million from the Unemployment Trust Fund for a transition assistance program for returning veterans. The Dire Emergency Supplemental Appropriations Act also approved language that enables the Pension Benefit Guarantee Corporation to spend outside its administrative expense limit. *See*, 105 Stat. 142. Thus, the Davis-Bacon restriction is a separate and distinct provision unrelated to any funding provided to the Labor Department.

> or futurity (such as "to apply in all years hereafter"). *See* [*Minis v. United States*, 40 U.S. 132, 15 Pet. 443 (1841)]; *Norcross*, 142 Cl. Ct. at 768. In this case Congress used no words of futurity or permanency. Consequently, we do not infer from the absence of an appropriation standing alone that Congress intended to impose a permanent ban.

961 F.2d at 274. App. 8a-9a. The court of appeals further noted that:

> The unions offer snippets of legislative history in support of their argument for futurity, but legislative history can only help to explain a statute; it cannot reconstruct it. The unions also stress the presence of the words "notwithstanding any other provision of law . . ." in the rider. Pub. L. No. 102-27, § 303, 105 Stat. 130, 151. This language, however, goes to the breadth of the amendment's effect, not its duration. *Id.*

The court of appeals held that "nothing in the rider [Section 303 of the Dire Emergency Supplemental Appropriations Act] affects that ability of the Secretary to promulgate the present regulations at any time other than during the 1991 fiscal year." *Id.*[10]

The court of appeals' holding that the presence of "words of futurity" is the *sine qua non* of permanency is not consistent with decisions of the Comptroller General, which clearly hold that "use of words of futurity is not essential for an appropriation act provision to constitute permanent legislation":

---

[10] As discussed below, the court of appeals' decision in *Building and Construction Trades Department, AFL-CIO, et al. v. Martin*, also did not address the subsequent action of Congress concerning its 1992 Budget Request for $750,000 and 13 FTE's for its Employment Standards Administration to implement the new helper regulations, even though it was brought to the court's attention by the Building Trades, *et al.*, *infra* at 27-30.

> The use of words of futurity is not essential for an appropriation act provision to constitute permanent legislation, "if the permanent character of the legislation is otherwise clearly indicated." 9 Comp. Gen. 248, 249 (1929). *One indication of permanence is when the provision is of a general nature, bearing no relation to the objects of the appropriation act.*

Matter of Permanency of Weapons Testing Moratorium, *supra* (emphasis added); *see also*, *Matter of Federal Judges IV*, *supra*. As stated above, Section 303 bears no relation to the objects of the Dire Emergency Supplemental Appropriations Act, nor do its terms limit its application to any other appropriation or period.

Similarly, the court of appeals' reliance on *Minis v. United States*, 40 U.S. (15 Pet.) 423 (1841), is misplaced. *Minis* concerned an interpretation of an appropriations act enacted in 1835, which, after setting forth specific appropriations, contained the following *proviso*:

> *Provided*, that no officers of the army shall receive any per cent, or additional pay . . . on account of disbursing any public money *appropriated by law during the present session* for fortifications, execution of surveys, works of internal improvement, building of arsenals, purchase of public supplies of any description, or for any other service of duty whatsoever, unless authorized by law.

Id. at 445. It is not surprising that the Court in *Minis* simply concluded that the proviso, consistent with its express terms, applied only to the expenditure of funds appropriated by law during the session to which the proviso itself referred. *Id.* at 447.

Unlike the proviso at issue in *Minis*, Section 303 of the Dire Emergency Supplemental Appropriations Act cannot be read to "except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it."

Had Section 303 of the Dire Emergency Supplemental Appropriations Act been enacted as a proviso to a specific appropriation contained in the Act, then the Court of Appeals' reliance on *Minis* would be warranted. Section 303, however, is *not* a proviso. Section 303 is freestanding legislation unrelated to any appropriation in the General Provisions of the Dire Emergency Supplemental Appropriations Act. Indeed, as already noted, nowhere in the Dire Emergency Supplemental Appropriations Act are there general appropriations for the Labor Department.

Moreover, the court of appeals' disparaging characterization of the legislative history of Section 303 cited by the Building Trades, *et al.*, as "snippets" is unfair and inaccurate. An examination of the relevant legislative history of the Dire Emergency Supplemental Appropriations Act conclusively demonstrates that Congress intended that Section 303 have permanent legislative effect. Both the House of Representatives and the Senate fully debated proposed amendments, the passage of which would have deleted Section 303 from the Dire Emergency Supplemental Appropriations Act,[11] before rejecting the proposed amendment, both the supporters and opponents of Section 303 of the Dire Emergency Supplemental Appropriations Act indicated, without exception, that it was intended to be permanent legislation.[12] Senate debate

---

[11] *See* App. L, M and N.

[12] Representative Ford, Chairman of the House Education and Labor Committee, in support of Section 303, stated:

> I support [Section 303] because it would assure that these Davis-Bacon and apprenticeship regulations will not be permitted to take or remain in effect, in the absence of proper approval in the course of legislative consideration.

137 Cong. Rec. H1528 (daily ed. March 7, 1991). App. 293a. Representative Stenholm, who introduced an amendment to delete Section 303 from the Dire Emergency Supplemental Appropriations Act, commented, "If I lose on this amendment, it will cost us $600 million a year for the next umpteen years," *id.* at H1526 (App. 282a), thereby indicating that Section 303 will remain in effect

similarly pointed to the permanency of Section 303.[13]

Finally, the court of appeals also failed to give effect to the phrase "or to implement or administer any other regulation that would have the same or similar effect," which Congress inserted in Section 303 following the language which prohibits the expenditure of funds to implement the current helper regulations. This language shows that Congress, without qualification as to time, banned the Secretary from implementing the current helper regulations or promulgating similar regulations in the future. It is a longstanding canon of statutory construction that effect must be given to every word, clause or sentence of a statute. *Reiter v. Sonotone*, 422 U.S. 330, 339 (1979); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

B. Labor-HHS 1992 Appropriations Act

Any doubt as to Congress' intent in enacting Section 303 was dispelled later *in the same session of Congress*,

---

unless or until Congress takes further legislative action. *See also, id.* at H1529 (statement of Representative Vento: "[Section 303] prohibits the Department of Labor from expending any funds to implement the proposed new regulations . . ." (App. 298a); *id.* at H1531 (statement of Rep. Ballenger: "The helper ban in this bill amounts to a major and expensive rewrite of the Davis-Bacon Act") (App. 305a).

[13] *See, e.g.*, Senator Nickle's description of the effect of Section 303:

> An appropriations bill is not the appropriate vehicle for introducing significant reversals in established governmental policies.

137 Cong. Rec. S3631 (daily ed. March 20, 1991). App. 328a. *See also id.* at S3627, S3630 (statements of Sen. Nickles (App. 367a-380a); *id.* at S3628-29 (statement of Sen. Adams) (App. 372a-374a); *id.* (statement of Sen. Symms) (App. 37a); *id.* at S3632 (statement of Sen. Akaka) (App. 375a-376a); 137 Cong. Rec. S3544-46 (daily ed. March 19, 1991) (statement of Sen. Nickles) (App. 322a-327a); *id.* at S3549 (statement of Sen. Adams) (App. 343a); *id.* at S3552 (statement of Sen. Helms) (App. 359a).

when Congress enacted the Labor-HHS 1992 Appropriations Act. App. 406a. However, the court of appeals' decision below nowhere gives any weight (or even mentions) these additional expressions of congressional intent regarding the "permanent" effect of Section 303 contained in the Labor-HHS 1992 Appropriations Act.

This Court has recognized that the pronouncement of a whole legislature respecting the intent of a previously enacted statute—in the form of a new statute declaring such intent—can properly be accorded "great" or "significant" weight by a court charged with construing the earlier statute,[14] although it is certainly not binding or conclusive on the issue of construction.[15] Moreover, this

[14] *Red Lion Broadcasting Co. v. Federal Communications Comm.*, 395 U.S. 367 (1969) (subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction); *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 367 (1974) (subsequent legislation declaring the intent of an earlier statute is entitled to significant weight); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980) (views of subsequent Congresses cannot override the unmistakable intent of the enacting one for purposes of the construction and interpretation of a federal law, but such views are entitled to significant weight, particularly when the precise intent of the enacting Congress is obscure); *Gozlon-Peretz v. United States*, —— U.S. ——, 111 S. Ct. 840 (1991) (the view of a later Congress does not establish definitively the meaning of an earlier enactment, but does have persuasive value).

[15] On the other hand, the Court has consistently regarded the later pronouncements of individual legislators respecting the meaning or intent of a previously enacted statute as having little, if any, weight in the judicial construction of the statute. *United States v. United Mine Workers*, 330 U.S. 258 (1947) (the views of individual Senators during debate in May, 1943, concerning the Norris-LaGuardia Act, passed in 1932, could not be accorded the same weight as if made by the same individuals in the course of the Norris-LaGuardia debates); *United States v. Wise*, 370 U.S. 405 (1962) (interpretation placed upon an existing statute by a group of Congressmen in the courts when unsuccessfully promoting later legislation can be given no persuasive effect or significance as an

Court has held that the pronouncement of a legislative commitee respecting the meaning of a previously enacted statute is entitled to considerable weight in the judicial construction of a statute, where the committee in question had reported the bill on which the statute was based, and where the pronouncement is not long after the statute's enactment. *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980); *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942); *see also, Nat'l Senior Citizens Law Center v. Legal Services Corp.*, 751 F.2d 1391 (D.C. Cir. 1985).

The decision below not only failed to accord the legislative history of the Labor-HHS 1992 Appropriations Act "great weight," it completely ignored three congressional reports which stated categorically that Congress had enacted a permanent prohibition on implementation of the Davis-Bacon helper regulations by the Secretary of Labor. Conf. Rep. No. 282, 102d Cong., 1st Sess. 17 (1991). It completely ignored the fact that Congress voted consistently with these expressions of congressional intent to reduce the DOL Budget Request by $750,000, deleting funds specifically earmarked by DOL for 13 new FTE's needed to administer the new helper regulations. The court completely ignored that the congressional reports that accompanied the Labor-HHS 1992 Appropriations Act were prepared by the same committees of the same Congress that had adopted the Dire Emergency Supplemental Appropriations Act only a few months earlier. Thus, under the circumstances of this case, the court of appeals should have given the committee reports that accompanied the Labor-HHS 1992 Appropriations Act

---

aid to construction of an existing statute); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, *reh. denied*, 387 U.S. 926 (1967) (statements of Congressmen and Senators regarding their interpretation of the construction industry proviso to § 8(e) of the National Labor Relations Act could represent only the personal views of the legislators, since the statements were inserted in the Congressional Record after the passage of the Act).

great weight in determining whether Congress intended permanently to prohibit the Secretary of Labor from implementing the new helper regulation.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

LAURENCE J. COHEN
TERRY R. YELLIG
(Counsel of Record)
1125 15th Street, N.W.
Washington, D.C. 20005
(202) 785-9300
Attorneys for Petitioner
Building and Construction
Trades Department, AFL-CIO

ROBERT J. CONNERTON
PHILLIS PAYNE
PAUL GREENBERG
1920 L Street, N.W.
Washington, D.C. 20036
(202) 466-6790
Attorneys for Petitioner
Laborers' International Union
of North America, AFL-CIO

92-130

No. ———

Supreme Court, U.S.
FILED
JUL 20 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners,

v.

LYNN MARTIN, SECRETARY OF LABOR, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

LAURENCE J. COHEN
TERRY R. YELLIG
(Counsel of Record)
1125 15th Street, N.W.
Washington, D.C. 20005
(202) 785-9300
Attorneys for Petitioner Building and Construction Trades Department, AFL-CIO

ROBERT J. CONNERTON
PHILLIS PAYNE
PAUL GREENBERG
1920 L Street, N.W.
Washington, D.C. 20036
(202) 466-6790
Attorneys for Petitioner Laborers' International Union of North America, AFL-CIO

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

APPENDIX A — Page

Decision of the United States Court of Appeals for the District of Columbia, *Building and Construction Trades Department, AFL-CIO, et al. v. Lynn Martin, Secretary of Labor, et al.*, April 21, 1992 ..... 1a

APPENDIX B

Decision of the United States Court of Appeals for the District of Columbia, *Building and Construction Trades Department, AFL-CIO, et al. v. Raymond J. Donovan, Secretary of Labor, et al.*, July 5, 1983 ..... 16a

APPENDIX C

Decision of the United States District Court for the District of Columbia, *Building and Construction Trades Department, AFL-CIO, et al. v. Elizabeth H. Dole, Secretary of Labor, et al.*, September 24, 1990 ..... 60a

APPENDIX D

Decision of the United States District Court for the District of Columbia, *Building and Construction Trades Department, AFL-CIO, et al. v. Raymond J. Donovan, Secretary of Labor, et al.*, December 23, 1982 ..... 72a

APPENDIX E

Decision of the United States District Court for the District of Columbia, *Building and Construction Trades Department, AFL-CIO, et al. v. Raymond J. Donovan, Secretary of Labor, et al.*, July 22, 1982 ..... 79a

APPENDIX F

Decision of the United States District Court for the District of Columbia, *Building and Construction Trades Department, AFL-CIO, et al. v. Elizabeth H. Dole, Secretary of Labor, et al.*, January 30, 1991 ..... 98a

TABLE OF CONTENTS—Continued

APPENDIX G — Page

Decision of the United States District Court for the District of Columbia, *Building and Construction Trades Department, AFL-CIO, et al. v. Raymond J. Donovan, Secretary of Labor, et al.*, December 21, 1984 ..... 101a

APPENDIX H

Notice Establishing Effective Date for Amendments of 29 C.F.R. Parts 1 and 5, 55 Fed. Reg. 50148-50 (1990) 104a

APPENDIX I

Procedures for Predetermination of Wage Rates; Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction and to Certain Nonconstruction Contracts: Final Rule. 54 Fed. Reg. 4234-44 (1989).. 115a

APPENDIX J

Procedures for Predetermination of Wage Rates; Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction and to Certain Nonconstruction Contracts: Proposed Rule. 52 Fed. Reg. 31366-31372 (1987) 155a

APPENDIX K

Procedures for Predetermination of Wage Rates; Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction and to Certain Nonconstruction Contracts: Final Rule. 47 Fed. Reg. 23644 and 23658 (1982) 181a

APPENDIX L

137 Cong. Rec. H1526-33 (March 7, 1991)..... 281a

APPENDIX M

137 Cong. Rec. S3544-53 (March 19, 1991) 321a

TABLE OF CONTENTS—Continued

APPENDIX N — Page

137 Cong. Rec. S3627-32 (March 20, 1991) 366a

APPENDIX O

Excerpt from Hearings on "Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1992" before the Subcommittee on the Departments of Labor, Health and Human Services of the House Committee on Appropriations 387a

APPENDIX P

Excerpt from House Report 102-121, 102d Cong., 1st Session 396a

APPENDIX Q

Excerpt from Senate Report 102-104, 102d Cong., 1st Session 400a

APPENDIX R

Excerpt from Conference Report 102-282, 102d Cong., 1st Session 405a

APPENDIX S

137 Cong. Rec. H10856 (November 22, 1991) 409a

APPENDIX T

137 Cong. Rec. S17782 (November 22, 1991) 411a

APPENDIX U

137 Cong. Rec. H10902 (November 22, 1991) 413a

APPENDIX V

Affidavit of John T. Dunlop (July 15, 1982) 422a

APPENDIX W

Affidavit of Robert A. Georgine (April 26, 1989) .. 432a

TABLE OF CONTENTS—Continued

APPENDIX X — Page

Affidavit of George A. Miller (December 31, 1990) 442a

APPENDIX Y

Affidavit of James M. Warren (April 26, 1989) 449a

APPENDIX Z

Affidavit of Carl E. Booker (April 27, 1989) 465a

APPENDIX AA

Affidavit of John T. Dunlop (December 17, 1990) .. 474a

APPENDIX BB

Excerpts from "Generel Wage Determinations issued under the Davis-Bacon and Related Acts" (U.S. Department of Labor, January 2, 1987) 479a

APPENDIX CC

Relevant Statutory Provisions

Davis-Bacon Act of 1935, 40 U.S.C. § 276a et seq. 520a

Dire Emergency Supplemental Appropriations For Consequences of Operation Desert Shield/ Desert Storm, Food Stamps, Unemployment Compensation Administration, Veterans Compensation and Pensions, and Other Urgent Needs Act of 1991, Pub. L. No. 102-27, 105 Stat. 130 *et seq.* 523a

Administrative Procedures Act, 5 U.S.C. § 553 ..... 524a

Administrative Procedures Act, 5 U.S.C. § 706 ..... 526a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 31, 1991 Decided April 21, 1992

No. 905345

BUILDING & CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,
Appellants

v.

LYNN MARTIN, SECRETARY OF LABOR, *et al.*

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 82-01631)

Terry R. Yellig for appellant Building and Construction Trades Department, Inc.

Robert J. Connerton, with whom *Paul Greenberg* was on the brief, for appellant Laborers' International Union of North America, AFL-CIO.

Robert M. Loeb, Attorney, Department of Justice, with whom *Stuart M. Gerson*, Assistant Attorney General, *Jay B. Stephens*, United States Attorney, and *Anthony J. Steinmeyer*, Attorney, Department of Justice, were on the brief, for appellees.

Jerry L. Hill and *Mark Bredemeier* were on the brief for amicus curiae Landmark Center for Civil Rights, urging that this Court uphold the validity of the helper regulations.

Maurice Baskin and *Patrick J. Stewart* were on the brief, for amicus curiae Associated Builders and Contractors, Inc., urging that the District Court's decision be affirmed.

Before D.H. GINSBURG, SENTELLE and HENDERSON, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*: The Building and Trades Department, AFL-CIO, and the Laborers' International Union, AFL-CIO, ("the unions") appeal from an order of the District Court vacating its injunctions of the implementation of five regulations promulgated by the Secretary of Labor pursuant to the Davis-Bacon Act. The provisions in question regulate the wages and use of the "helper" class of workers on federal construction projects. We uphold four of the challenged provisions, but strike down as arbitrary and capricious a formula for calculating a cap on the ratio of helpers to journeymen on federal construction projects.

BACKGROUND

In 1931, Congress enacted the Davis-Bacon Act (the "Act"), 40 U.S.C. § 276a *et seq.* (1986), to ensure that workers on federal construction projects were paid no less than prevailing wage rates in the locality of such projects. 74 CONG. REC. 6510 (1931) (statement of Sen. Bacon). As noted by this Court,

> [t]he evil sought to be remedied was that, with the precise specifications set out in federal contracts and the increasing standardization of building-material prices, the low-bidding contractor on a federal job was generally the one who paid the lowest wages. . . .

> The contractor would accomplish this by taking advantage of widespread unemployment in the construction industry and hiring workers at substandard wages, often bringing a low-paid crew in from distant areas.

Building and Construction Trades' Dept., AFL-CIO v. Donovan, 712 F.2d 611, 613-14 (D.C. Cir. 1983) (citations omitted), *cert. denied*, 464 U.S. 1069 (1984). Under the Act, the advertised specifications for each federal construction project in excess of $2,000 must contain minimum wage provisions for each class of laborer and mechanic based upon prevailing wages in the locality of performance as determined by the Secretary of Labor. 40 U.S.C. § 276a(a) (1986).

Pursuant to the broad statutory mandate to set wages and classify workers, the Secretary of Labor has by regulation recognized several categories of workers and set out rules governing their employment on federal construction projects. Prior to 1982, the regulations permitted the use of the helper classification only where the tasks to be performed by helpers were defined and could be differentiated from the duties of journeymen, and where the helper classification prevailed in the area where the contract was to be performed. Regulatory changes proposed in 1982 attempted to redefine helper as a "semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman." 29 C.F.R. § 5.2(n)(4) (1991). The new regulation went on to permit an overlap of duties between those of a helper and those of a journeyman. Where the older regulations had permitted the use of the helper classification in areas where that job title prevailed, the new regulation permitted the use of the classification where the use of helpers was an "identifiable" local practice. 47 Fed. Reg. 23,655 (1982). The regulation further permitted the use of no more than two helpers for every three journeymen. 29 C.F.R. § 5.5(a)(4)(iv) (1991).

The unions immediately sued to enjoin implementation of the 1982 helper regulations and several other of the Secretary's new proposals. Finding for the unions in part, the District Court enjoined implementation of the helper provisions. *Building and Construction Trades Dept., AFL-CIO v. Donovan*, 553 F. Supp. 352 (D.D.C. 1982). On appeal, we affirmed the District Court's judgment in part and reversed in part. *Building and Construction Trades' Dept.*, 712 F.2d at 633. We agreed that the Secretary had improperly permitted the use of helpers in localities where their actual use was merely "identifiable" as opposed to "prevailing." *Id.* at 624-26. However, we found acceptable the Secretary's broad definition of helper. *Id.* at 626-30. The District Court modified its judgment accordingly by rescinding its injunction as to the definition of helper, while leaving in place its injunction as to the test for whether helpers are "prevailing" and as to the other helper provisions. *Building and Construction Trades Department, AFL-CIO v. Donovan*, 102 Lab. Cas. (CCH) ¶ 34,648 (D.D.C. 1984). The District Court expressed its willingness to consider rescinding its remaining injunction if the Department of Labor ("DOL") revised the helper regulations. *Id.*

The Secretary proposed new helper regulations on August 19, 1987, 52 Fed. Reg. 31,366 (1987), and gave notice of their adoption on January 27, 1989, 54 Fed. Reg. 4234-44 (1989). Obedient to our holding in *Building and Construction Trades' Dept.* that a "prevailing" use of helpers is more than merely an "identifiable" use, the new proposal set forth two alternative tests for determining whether the use of helpers "prevails" in a particular locality. The regulation provides:

> (1) If the prevailing wage for a particular journeyman classification is a wage that is paid to the majority of the journeymen . . ., then the practice followed by those contractors whose rates are adopted as prevailing for the journeyman shall also be deemed the

> prevailing practice in determining whether to issue a helper classification. Any ambiguity with regard to such practice, will be resolved by following the rule in paragraph (d)(2) of this section with respect to those contractors.
>
> (2) If the prevailing wage for a particular journeyman classification is the average of the wages paid to the journeymen, weighted by the total number of journeymen . . ., then the total number of workers in the classification employed by contractors utilizing helpers (journeymen plus apprentices, trainees, and helpers as defined in § 5.2(n)(4) of this chapter) on reported projects will be compared to the total number of workers in the classification employed by contractors not utilizing helpers . . ., and the practice which covers the majority of such workers shall be deemed the prevailing practice in determining whether to issue a helper classification.

29 C.F.R. § 1.7(d)(1)-(2) (1991).

In other words, where the Secretary verifies that the prevailing journeyman wage in a locality where a federal construction project is to be situated is the wage paid to the majority of journeymen in that locality, then the helper classification is deemed to prevail if contractors who pay the prevailing wage use helpers. The classification is deemed not to prevail if contractors who pay the prevailing journeyman wage do not use helpers. Second, if the Secretary has used a weighted average method to determine the prevailing wage for journeymen, then the Secretary compares the total number of workers employed by contractors in the area who use helpers to the total number of workers employed by contractors who do not. The practice followed by the employers of the larger number is deemed the prevailing practice. *Id.* In the present appeal the unions attack these new tests.

The 1989 regulations also revised the "conformance" procedure prescribed by the Secretary. The conformance

procedure is a long-used device for adding an employee classification to the specifications of an existing government contract. Generally, the conformance procedure provides that whenever an existing contract does not contain a classification otherwise necessary to perform a government contract, the contracting officer may propose the appropriate classification and wage rate to the Administrator of the Wage and Hour Division, who is authorized to approve, modify, or disapprove the contracting officer's action within thirty days. *See* 29 C.F.R. § 5.5(a)(1)(ii) (1991).

The revised conformance procedure provides that the contracting officer may approve an additional classification and wage rate only when the work to be performed is not already performed by a classification in the existing wage determination, the proposed classification "is *utilized* in the area by the construction industry," and the proposed wage rate bears a reasonable relationship to the wage rate contained in the determination. 29 C.F.R. § 5.5(a)(1)(ii)(A) (emphasis supplied). The 1989 revision excepted the helper classification from the prohibition against performance of work already assigned to another classification in the contract. 29 C.F.R. § 5.5(a)(1)(ii)(A)(*1*) (1991). Additionally, the Secretary of Labor, in a new provision, expressly added the requirement that "with respect to helpers . . . such a classification *prevails* in the area in which work is to be performed," 29 C.F.R. § 5.5(a)(1)(ii)(A)(*4*) (emphasis supplied), not merely is "utilized."

On September 24, 1990, the District Court vacated the remaining portions of its injunction. It thereby rejected all of the unions' challenges, concluding that our prior opinion compelled it to uphold these regulations. *Building and Construction Trades Department, AFL-CIO v. Dole*, 116 Lab. Cas. (CCH) ¶ 35,395 (D.D.C. 1990). Subsequently, the unions appealed to this Court. The unions contend that the "prevailing" test undermines the purpose

and objectives of the Act by, among other things, recognizing "non-prevailing practices." They further argue that the DOL's definition of helper subverts the purpose of the Act by allowing two or more worker classes to perform the same task. The unions also object to both of the 1989 modifications to the conformance procedures and to the cap of two-to-three on the ratio of helpers to journeyman employable on federal construction projects, 29 C.F.R. § 5.5(a)(4)(iv) (1991), which remained unaffected by the 1989 modifications.

Discussion

A. *The Appropriations Bill Rider*

Before discussing the substance of the regulations, we first note that the unions object to the authority of the Secretary to implement the helper regulations. On April 10, 1991, Congress attached a rider to an emergency supplemental appropriations bill making funds available for the United States military operation in the Middle East. *Dire Emergency Supplemental Appropriations for Consequence of Operation Desert Shield/Desert Storm, Food Stamps, Unemployment Compensation Administration, Veterans Compensation and Pensions, and Other Urgent Needs Act of 1991*, Pub. L. No. 102-27 § 303, 105 Stat. 130, 151 (1991). The rider prohibited the Secretary from spending any funds to implement the helper regulations, stating:

> Notwithstanding any other provision of law, no funds shall be expended by the Secretary of Labor to implement or administer the [helper definition, the 2:3 ratio, the test for when helpers are prevailing, and the revised conformance provision] . . . or to implement or administer any other regulation that would have the same or similar effect.

Id. The unions argue that the rider is permanent legislation—a congressional directive barring implementation.

They note that the rider has no expiration date apparent on its face and submit that when a rider's language suggests a congressional intent that it be made permanent law, this Court must respect that intent. *See, e.g., Elizabeth Norcross v. United States*, 142 Cl. Ct. 767 (1958). The difficulty with the unions' argument is that we see no evidence of a congressional intent that this rider be made permanent law.

While appropriation acts are "Acts of Congress" which can substantively change existing law, there is a very strong presumption that they do not, *see TVA v. Hill*, 437 U.S. 153, 190 (1978), and that when they do, the change is only intended for one fiscal year. *See Minis v. United States*, 40 U.S. 132, 15 Pet. 443 (1841); *National Treasury Employees Union v. Devine*, 733 F.2d 114, 120 (D.C. Cir. 1984); GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 2-34 (1982). In fact, a federal appropriations act applies only for the fiscal year in which it is passed, unless it expressly provides otherwise. *See* 31 U.S.C. § 1301(c)(2) (1991). Accordingly, a provision contained in an appropriations bill operates only in the applicable fiscal year, unless its language clearly indicates that it is intended to be permanent.

The unions argue that a clear intent to establish a permanent bar in this case is present in Congress' statement that, "no funds shall be expended by the Secretary of Labor to implement or administer" the disputed regulations. The unions claim that the location of this statement in a rider attached to an act that did not appropriate any funds for that purpose further establishes clarity of intent to bar implementation permanently.

It is true, as the unions note, that the General Accounting Office (the "GAO"), in its publication, GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, recognizes that the absence of an appropriation for the purpose limited

by the rider is some indication of permanence. *Id.* at 2-34—2-37. However, while the absence of such an appropriation may be useful in ascertaining congressional intent, standing alone it is not enough to indicate permanence. As the GAO has also stated, "the presence or absence of words of futurity remains the crucial factor, and the additional factors have been used for the most part to support a conclusion based primarily on this presence or absence." *Id.* at 2-37. Similarly, as GAO has explained, "a proviso or general provision [in an appropriations act] that does not contain words of futurity will generally not be construed as permanent." *See id.* at 2-34—2-35. Principally, courts have recognized that when Congress intends a provision in an appropriations bill to have permanent effect, it uses words of permanency or futurity (such as "to apply in all years hereafter"). *See Minis*, 40 U.S. at 134, 15 Pet. at 445; *Norcross*, 142 Cl. Ct. at 768. In this case Congress used no words of futurity or permanency. Consequently, we do not infer from the absence of an appropriation standing alone that Congress intended to impose a permanent ban.

The unions offer snippets of legislative history in support of their argument for futurity, but legislative history can only help to explain a statute; it cannot reconstruct it. The unions also stress the presence of the words "notwithstanding any other provision of law . . ." in the rider. Pub. L. No. 102-27, § 303, 105 Stat. 130, 151. This language, however, goes to the breadth of the amendment's effect, not its duration.

In short, nothing in the rider affects the ability of the Secretary to promulgate the present regulations at any time other than during the 1991 fiscal year. The record before us indicates that the Secretary did not expend any funds to implement or administer the new helper regulations during the 1991 fiscal year. Therefore, the presence of the appropriations rider offers us no reason to find error in the District Court's order.

B. *The Content of the Regulations*

Having determined that the Secretary retains the statutory authority to implement the regulations, our function remains the same as it was for our previous review of these regulations. As we stated then, "our task is limited to ensuring that the new definition [of helper] is not one 'that bears no relationship to any recognized concept of [the statutory term] or that would defeat the purpose of the [statutory] program.'" *Building and Construction Trades' Dept.*, 712 F.2d at 616, quoting *Batterton v. Francis*, 432 U.S. 416, 428 (1977). In other words, we must ensure that the Secretary "is acting consistently with the purposes of the statute and that his choice is not arbitrary." *Building and Construction Trades' Dept.*, 712 F.2d at 618.

1. The revised tests for "prevailing" use of helpers

The unions have in no way demonstrated that the Secretary acted arbitrarily in designing the new tests, or that the tests defeat the purpose of the Act by recognizing "non-prevailing practices." In striking the old "identifiable" standard, we concluded that it defeated the purpose of the Act. That is, if a federal project could use the helper classification in a locality where it merely could be "identified," but in which, for example, the majority of workers were on union projects not employing the helper category and were receiving higher wages than helpers, then according to any definition of "prevailing," the contractor on the project "would not be paying the wage prevailing for the corresponding class of workers in that city." *Building and Construction Trades' Dept.*, 712 F.2d at 625.

The new tests do not suffer from the same defect, especially as, between them, they cover each possibly applicable concept of "prevailing." Any federal project employing the helper category will reflect either the practice of contractors employing a majority of journeymen in the

locality or a majority of workers engaged in relevant employment in a weighted average locality. In neither instance can the Secretary's determination that a practice prevails be said to be arbitrary or contrary to the Act's purpose of aligning wages on federal projects with local rates.

2. Definition of "helper"

Under the rubric of "underclassification," the unions renew an attack on the definition of helper rejected by this Court in *Building and Construction Trades' Dept.*, 712 F.2d at 626-30. The underclassification theory holds that the Act's attempt to mirror the local wage is subverted when a regulatory definition allows members of a lower paid and lower skilled class to be hired to perform tasks which a higher class normally performs in cases where tasks overlap. The unions contend that the supervision-based helper definition now proposed by the Secretary, rather than one based on task surveys, will bring work performed in the past by unionized laborers into the job description of lower paid helpers.

The short answer to this objection is that we already approved the definition in *Building and Construction Trades' Dept.* and, consequently, it will, as the law of the case, survive the present challenge. *See* 712 F.2d at 629-30. Furthermore, we remain fully satisfied with our treatment of this issue in our previous decision. As we discussed at length in the earlier opinion, the Secretary's statutory authority does not require task-oriented definitions. *Id.* Insofar as the unions' objection is based on the failure of the Secretary to employ task surveys in *implementation* of the regulation, that question is not before us. In this case we review its validity, not its implementation.[1]

---

[1] We do not understand the use of the supervision-based definition to preclude any role for task-based surveys in implementation.

The argument that the regulation sweeps "higher paid" laborers into the category of "lower paid" helpers is illusory. There is no reason in reviewing the facial validity of this regulation to believe that the unions' assumptions are accurate. That semi-skilled helpers will be paid less than unskilled or semi-skilled laborers is far from a foregone conclusion. In any event, the whole argument focuses on the styling of workers rather than either what they do or who supervises them, and, as we have noted, nothing in the statute requires the Secretary to implement 'the union[s'] classification scheme." *Building and Construction Trades Dept.*, 712 F.2d at 627.

The argument also ignores the proposal by the DOL before us here, which would give full weight to the wages normally paid to unionized laborers when calculating the "prevailing wage" to be paid to helpers. First, it would count as helpers all unionized workers who fit the helper definition. Then, if a helper classification is determined to prevail in the area, the wages normally paid to unionized laborers would be given "full weight" in the calculation of the prevailing helper wage. "Full weight," according to the DOL, means that "if these union workers are the majority of the helpers in the area, then, generally, their 'majority wage' will be paid to all helpers. And if they are not the majority, their union wage will still be accounted for in the weighted average used to establish the prevailing wage." Brief of Appellees Secretary of Labor, *et al.*, at 34.

We approve of, and consider this proposal a necessary interpretation of, the "prevailing" test. Thus, laborers will be counted as helpers, and the helper wage will be either that paid to the majority or the average of the wages paid to the total employed in the helper class. This method is not only sensible, it is consistent with relevant provisions of the regulations. 29 C.F.R. § 1.2(a)(1)(1991) in its entirety states:

> The *prevailing wage* shall be the wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question. If the same wage is not paid to a majority of those employed in the classification, the *prevailing wage* shall be the average of the wages paid, weighed by the total employed in the classification.

3. Conformance provision

The unions raise several challenges to the revised conformance regulation, First, they contend that under the regulation a helper classification can be added when it is not "prevailing" in the area. However, the regulation expressly refutes that contention: "The contracting officer shall approve an additional classification . . . only when . . . [w]ith respect to helpers . . . such a classification *prevails* in the area in which the work is performed." 29 C.F.R. § 5.5(a)(1)(ii)(A)(4) (1991) (emphasis supplied).

Second, the unions assert that a contracting officer could add a helper class without DOL approval. This assertion also is simply incorrect. The conformance regulation expressly requires DOL approval before a helper class can be added, *see* 29 C.F.R. § 5.5(a)(1)(ii)(B)-(C) (191)—approval the DOL cannot grant unless the class prevails in the area.

They further object to the regulation's excepting the helper classification from the requirement that the work performed by the requested classification not be performed by a class already in the wage determination. They fear that this provision will allow a lower-paid helper classification to replace a higher-paid class of semi-skilled laborers already in the wage determination and working under the supervision of a journeyman.

As explained by the Secretary upon adoption of the regulation, however, the revision to the conformance reg-

ulation accommodates the helper definition by allowing a helper's duties to overlap with a journeyman's duties. 54 Fed. Reg. 4240-41 (1989). At the same time, the regulation specifically prohibits the addition of a lower-paid classification to replace an existing classification of semi-skilled workers, by providing that:

> any class of laborers or mechanics, including helpers, *which is not listed in the wage determination* and which is to be employed under the contract shall be classified in conformance with the wage determination.

29 C.F.R. § 5.5(a)(ii)(A) (1991) (emphasis supplied). By the terms of this section, if a class of workers whose members meet the helper definition is already listed in a wage determination (regardless of the name given to the classification in the wage determination), an additional helper classification would not be issued. Thus, if a laborer subclassification listed in the wage determination meets the helper definition, an additional helper classification would not be added to the contract. We therefore agree with the District Court that the revised conformance regulations survive the unions' challenge.

4. The 2:3 ratio

In 1982 the Secretary added to the helper regulations a cap of 2:3 on the ratio of helpers to journeymen. *See* 29 C.F.R. § 5.5(a)(4)(iv) (1991). Neither this Court nor the District Court has ruled on the validity of the 2:3 ratio, but we noted in 1983 that we would not be barred from considering the issue later if it remained a part of any reissued regulations. *Building and Construction Trades' Dept.*, 712 F.2d at 624 n.7. Today we conclude that the regulation setting the ratio reflects a purely arbitrary choice without rational decisionmaking.

The basis upon which the forty percent cap was selected by the Secretary as the numerical limit on the use of helpers on Davis-Bacon projects is unexplained. Neither the

1982 regulations nor the Notice of Proposed Rulemaking which preceded the final rulemaking, *see* 52 Fed. Reg. 31,366 (1987), explains its origin. At oral argument, counsel suggested that the Secretary may have relied on a ratio of nonjourneymen to journeymen found in a particular project agreement negotiated by the Building and Construction Trades Department, AFL-CIO, but the Secretary has provided no justification for making it a national standard. The administrative record shows little consideration of the ratios appearing in the industry and only minimal experimentation with a 1:5 ratio. *See* 46 Fed. Reg. 41,463 (1981).

Such an unsubstantiated imposition of a fixed ratio in a regulatory scheme based on a statute designed to implement prevailing practices represents the very essence of arbitrariness. It is true that a regulation must be sustained as long as the agency has articulated a reasonable basis for its decision. *American Trucking Associations, Inc. v. ICC*, 697 F.2d 1146 (D.C. Cir. 1983). Here, however, all the agency has done is to state that a 2:3 ratio better reflects industry use of helpers than did the 1:5 ratio. 55 Fed. Reg. at 50,148-49 (1990). To state a conclusion is not to reason. We therefore reverse the District Court's vacation of its injunction as to the 2:3 ratio.

CONCLUSION

We affirm the District Court's vacation of the injunction against enforcement of 29 C.F.R. §§ 1.7(d), 5.5(a)(1)(ii)(A)(*1*), and 5.5(a)(1)(ii)(A)(*4*). In so doing, we uphold the revisions of the "prevailing" test and of the conformance provision. However, we reverse the District Court's vacation of the injunction against the enforcement of 29 C.F.R. § 5.5a(4)(iv), the formula of 2:3 for calculating a cap on the ratio of helpers to journeymen on federal construction projects, and invalidate this one provision as arbitrary and capricious.

Affirmed in part and reversed in part.

APPENDIX B

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

Nos. 83-1118, 83-1157

BUILDING & CONSTRUCTION TRADES' DEPARTMENT, AFL-CIO, *et al.*

v.

RAYMOND J. DONOVAN, Secretary of Labor, *et al.*,
Appellants.

BUILDING & CONSTRUCTION TRADES' DEPARTMENT, AFL-CIO, *et al.*,
Appellants,

v.

RAYMOND J. DONOVAN, Secretary of Labor, *et al.*

Appeals from the United States District Court
for the District of Columbia
(D.C.Civil No. 82-01631).

Argued May 6, 1983

Decided July 5, 1983

J. Paul McGrath, Asst. Atty. Gen., Washington, D.C., with whom Stanley S. Harris, U.S. Atty., Carolyn B.

Kuhl, Deputy Asst. Atty. Gen., Robert E. Kopp, Anthony J. Steinmeyer, Frank A. Rosenfeld, Attys., Dept. of Justice, and Karen I. Ward, Associate Sol., Dept. of Labor, Washington, D.C., were on the brief, for appellants/cross-appellees.

Laurence Gold and Terry R. Yellig, Washington, D.C., with whom Laurence J. Cohen and Robert J. Connerton, Washington, D.C., were on the brief, for appellees/cross-appellants. Linda Lipsett, Washington, D.C., also entered an appearance for appellee in 83-1118.

Thomas S. Martin, Washington, D.C., was on the brief for Associated Builders and Contractors, Inc., amicus curiae urging reversal in 83-1118 and affirmance in 83-1157.

G. Brockwel Heylin and Michael E. Kennedy, Washington, D.C., were on the brief for Associated Gen. Contractors of America, Inc., amicus curiae urging reversal in 83-1118 and affirmance in 83-1157.

Before EDWARDS, Circuit Judge, and McGOWAN and MacKINNON, Senior Circuit Judges.

Opinion for the Court filed by Senior Circuit Judge McGOWAN.

McGOWAN, Senior Circuit Judge:

This appeal brings before us on an expedited basis five provisions of certain final rules issued by the Secretary of Labor ("the Secretary") under the Davis-Bacon Act, 40 U.S.C. § 276a et seq. (1976), and the Copeland Anti-Kickback Act, 40 U.S.C. § 276c (1976). These statutes, essentially unchanged since their enactment or amendment in the 1930's, guarantee to workers on federal construction projects a minimum wage based on locally prevailing wage rates. Three of the new regulatory provisions of concern here would alter the method for finding the prevailing wage. Another set of regulations would allow federal contractors far greater freedom to use semi-

skilled helpers on projects than has previously been permitted. The Secretary asserts that this expanded use of helpers would better reflect the practice on private projects. The fifth provision is intended to ease the regulatory burden on federal construction contractors by reducing the detail required in their weekly submissions to the government regarding wages. All of the regulations under challenge are expected to reduce federal construction costs; the Secretary has estimated that the last two provisions alone would save the government or its contractors about $463 million per year. *See* 47 Fed.Reg. 23,657, 23,662, 23,664 (1982) (regulatory impact statement).

This action was brought by the AFL-CIO, sixteen AFL-CIO unions or departments, and the Teamsters union ("the unions"), seeking an injunction against implementation of the new regulations and a declaration that the rules are contrary to law. No claims of procedural irregularity were pressed. The District Court granted the requested relief in part. We affirm in part and reverse in part. We uphold all of the new regulations as within the broad administrative discretion contemplated by Congress, except for (1) the provision simplifying submissions of wage data to the government, which we find to be inconsistent with the language and purpose of the statutory command that the submissions contain wage data as to "each employee," and (2) part of the expanded permission to use helpers, which part we find similarly contrary to statutory language and purpose.

I

As noted, the Davis-Bacon Act was enacted during the Great Depression to ensure that workers on federal construction projects would be paid the wages prevailing in the area of construction. The evil sought to be remedied was that, with the precise specifications set out in federal contracts and the increasing standardization of building-material prices, the low-bidding contractor on a federal

job was generally the one who paid the lowest wages. *See generally* S.REP. No. 332, 74th Cong., 1st Sess. pt. 2, at 4 (1935) ("variations between bids submitted by competing contractors are due most frequently to different estimates of labor costs"). The contractor would accomplish this by taking advantage of widespread unemployment in the construction industry and hiring workers at substandard wages, often bringing a low-paid crew in from distant areas. *Id.* at 7-8.

This practice was deemed to be a problem for two reasons. First, and apparently most important, it tended to undercut one of the purposes of the massive federal building program of the times, which was to distribute employment and federal money equally throughout the country. S.REP. No. 1445, 71st Cong., 3d Sess. 1-2 (1931). Local contractors and workers, used to a certain wage and living standard, could not compete with the migratory labor of the winning bidder. *Id.* at 2; *see also* 4 CONG.REC. 6510 (1931) (remarks of Senator Bacon) ("I think it is a fair proposition where the Government is building these post offices and public buildings throughout the country that the local contractor and local labor may have a 'fair break' in getting the contract."); 10 Comp.Gen. 294, 295 (1931) (" 'The Government should be the last employing agency to expect or countenance the performance of its construction contracts at the sacrifice of its citizens.' ") (quoting letter from Treasury Secretary proposing administrative predecessor of Davis-Bacon Act).

Second, the lower wages led to labor strife and to broken contracts by contractors who speculated on the labor market unwisely, thus preventing "the most economical and orderly granting of Government contracts." S.REP. No. 332, *supra* p. 613, pt. 2, at 8; *see also* 74 CONG. REC. 6510 (1931) (remarks of Rep. LaGuardia) ("the workmanship of the cheap imported labor was of course very inferior"). Nevertheless, under a ruling by the Comptroller General, federal contracting agencies could

not insist on contractors paying the prevailing wage because of the statutory requirement that federal contracts go to the lowest bidder. 10 Comp. Gen. 294, 301 (1931) (prevailing wage requirement would "remove[] from competitive bidding on the project an important element of cost and tend[] to defeat the purposes of the [low-bid] statute"). Thus, legislation was called for.

The original Davis-Bacon Act was enacted in 1931 and required that federal contractors on certain projects pay the prevailing wage in the area, as determined by the contractors. Any disputes over the contractors' determinations were to be referred to the Secretary for conclusive determination. Davis-Bacon Act, ch. 411, 41 Stat. 1494 (1931). Dissatisfaction with this arrangement surfaced quickly, however, as widespread violations and abuses were discovered. An attempt to provide for predetermination of the prevailing wage by the Secretary and penalties for failure to pay that rate was vetoed by President Hoover in 1932 as "obscure and complex and . . . impracticable of administration," 75 CONG.REC. 15,589 (1932) (veto message); *see id.* at 14,590 ("The whole design of the new . . . proposal requires an expansion of bureaucratic control over activities which now function effectively with the minimum of interference by the Government and that only when dispute arises.").

Congress had greater success in 1935. It passed wage predetermination and enforcement provisions that have remained essentially unchanged to this day. The Act now provides that the advertised specifications for every federal construction project in excess of $2,000 that requires the employment of mechanics and/or laborers

> shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and

> mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed.

40 U.S.C. § 276a(a) (1976). The construction contract must contain a stipulation requiring that the advertised wages be paid, and the applicable wages must be posted at the site. Id. The contracting agency is empowered to withhold payment to ensure compliance with the minimum wage requirements. *Id.*

In response to some of the abuses prevalent under the 1931 act, Congress in 1934 also passed the Copeland Anti-Kickback Act, which generally makes it a crime for a federal contractor to require or coerce workers to return a portion of their contractual pay to their employer. Copeland Anti-Kickback Act, ch. 482, § 1, 48 Stat. 948 (1934) (codified as amended at 18 U.S.C. § 874 (1976)). The section of the Copeland Act that is relevant here directs the Secretary to make reasonable regulations for federal contractors, "including a provision that each contractor and subcontractor shall furnish weekly a statement with respect to the wages paid each employee during the preceding week." 40 U.S.C. § 276c (1976).

The regulations at issue seek to implement these two statutes. They would alter the present regulatory scheme by (1) eliminating the so-called "thirty-percent rule" by which a locally prevailing rate could be set at the rate paid to a thirty-percent plurality of local workers; (2) combining data from adjacent rural counties but excluding any nearby urban counties when wage data in a given rural county is insufficient to determine a locally prevailing wage; (3) excluding from the prevailing-wage calculation for most building projects wages paid on similar local projects that were subject to the Davis-Bacon Act; (4) expanding the permitted use of semiskilled helpers in a number of ways, including permitting such a classifica-

tion in areas where it is only an "identifiable" practice rather than a "prevailing" one and eliminating the requirement that helpers may do only tasks distinct from those undertaken by other classes of workers; and (5) allowing contractors to submit a weekly statement certifying compliance with Davis-Bacon wage requirements, instead of requiring the submission of the actual weekly payrolls. *See* 47 Fed.Reg. 23,643, 23,657, 23,677 (1982) (to be codified at 29 C.F.R. § 3.3 and in scattered sections of 29 C.F.R. pts. 1 & 5).

Shortly after the rules were promulgated on May 28, 1982, the unions brought suit seeking declaratory injunctive relief. After a hearing on a motion for interim relief and cross-motions for summary judgment, the District Court on July 22, 1982, five days before the new regulations' scheduled effective date, granted a preliminary injunction barring implementation of all five provisions. *Building & Construction Trades Department v. Donovan*, 543 F.Supp. 1282 (D.D.C.1982). On December 23, 1982, the District Court granted summary judgment for plaintiffs on four of the five provisions at issue. *Building & Construction Trades Department v. Donovan*, 553 F.Supp. 352 (D.D.C.1982). The court declined to enjoin the elimination of the thirty-percent rule in the formula for calculating the locally prevailing wages. As to this provision, the court found that the statute left the task of defining the term "prevailing wage" to the Secretary, and that "Congress was fully aware that the definition might or would be adjusted depending on existing conditions." *Id.* at 354 (citing, *inter alia*, 74 CONG.REC. 6516 (1931); 75 CONG.REC. 12,365 (1932)).

The District Court found the statutory language and legislative history as to the remaining four provisions somewhat ambiguous, and relied heavily on contemporaneous and consistent administrative practice as a clue to Congress's intent. The court relied most heavily—almost exclusively—on this contrary administrative prac-

tice in striking down the proposed exclusion of urban counties from the prevailing wage calculation in rural areas and the exclusion of local Davis-Bacon projects from that calculation. See *id.* at 353-54.

With regard to the remaining two provisions, the court found, in addition to administrative practice, more direct indications of congressional intent. The court struck down the rule that a contractor need only submit a generalized affidavit certifying compliance with wage laws, rather than detailed payrolls, because the statute by its terms required weekly statements as to the wages paid "each employee," 543 F.Supp. at 1288, and because the new regulation "would render the Act largely unenforceable," 553 F.Supp. at 354. The court overturned the proposals for allowing increased use of semiskilled helpers because the distinction that the Act intended to draw between skilled and unskilled labor in practice could be maintained "only if the tasks of the helper class are defined as discrete and distinguishable from those of laborers and mechanics," *id.* at 355, and because allowing contractors to use helpers when it was merely an "identifiable" classification in the area would be contrary to the statutory command that wages set by the Secretary be "prevailing for . . . classes" in the area, 543 F.Supp. at 1285.

Both parties appealed. We discuss each provision of the new regulations in turn.

II

A. *The Thirty-Percent Rule*

Under a regulatory procedure in effect since 1935, the Secretary follows a three-step process to determine the prevailing wage for a given class of workers in a given area. First, if any single wage is paid to a majority of the workers in that class, that is deemed the prevailing wage. Second, if there is no single wage paid to a majority of workers, any wage paid to at least thirty per-

cent of the workers is the prevailing wage. Third, if no single wage is paid to a thirty-percent plurality, then a weighted average becomes the prevailing wage. 29 C.F.R. § 1.2(a) (1982); *accord* Labor Department Regulation No. 503 § 2 (1935), *reprinted in* Joint Appendix (J.A.) at 180-81. The new regulation proposed by the Secretary for defining the term "prevailing wage" would eliminate the second step: if a majority of the workers in a given class did not earn a single wage, then a weighted average would be used. 47 Fed. Reg. at 23,652 (to be codified at 29 C.F.R. § 1.2(a)(1)).

The rationale offered by the Secretary for the change was that the thirty-percent rule does not comport with the definition of "prevailing," that it "gives undue weight to collectively bargained rates," and that it is inflationary. *Id.* at 23,644, 23,645. The unions argue that the new definition does not fit within the common meaning of "prevailing" and that Congress's refusal to change the statute in 1932 and 1935 when informed of the Secretary's policy of setting the prevailing wage at the rate paid the greatest number of workers indicates that Congress intended the prevailing rate to be the "modal" rate. The unions also assert that under the new rule a third or more of the wage rates issued by the Secretary would be based on "artificial" averages rather than any actual rate, which they say is contrary to the policy of the Act.

We affirm the District Court's upholding of the new rule, generally for the reasons stated in its opinion. *See* 553 F.Supp. at 354. In brief, the statute delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing. *See* 40 U.S.C. § 267a(a) (1976) ("the wages that will be determined by the Secretary of Labor to be prevailing"). The legislative history confirms that it was envisioned that the Secretary could establish the method to be used. *See, e.g.*, 74 CONG.REC. 6516 (1931) (remarks of Rep. Kopp) ("A method for determining the prevailing wage rate might have been incorporated in the bill, but the Secre-

tary of Labor can establish the method and make it known to the bidders."). There is no indication that Congress's failure to change the method used by the Secretary since 1932 was intended to bind him to that method forever, and we will not infer such an intent when the statutory language is so plainly to the contrary.

Having determined that the statute empowers the Secretary to adopt "regulations with legislative effect," *Batterton v. Francis*, 432 U.S. 416, 425, 97 S.Ct. 2399, 2405, 53 L.Ed.2d 448 (1977) (interpreting statute providing that term "unemployment" is to be "determined in accordance with standards prescribed by the Secretary"), our task is limited to ensuring that the new definition is not one "that bears no relationship to any recognized concept of [the statutory term] or that would defeat the purpose of the [statutory] program." *Id.* at 428, 97 S.Ct. at 2407. The Secretary's new definition of "prevailing" as, first, the majority rate, and, second, a weighted average, is within a common and reasonable reading of the term. *Cf.* 75 CONG.REC. 12,365 (1932) (remarks of Rep. Connery, floor manager of 1932 amendments) (endorsing an averaging method of determining the prevailing wage). The definition also would not defeat the essential purpose of the statute, which was to ensure that federal wages reflected those generally paid in the area.

B. *Exclusion of Urban Counties from Rural Wage Determinations*

The Secretary's proposed regulations provide that, where there has not been sufficient similar construction in the county in which a project is located to determine a prevailing wage, he is to look to wages paid on similar construction in surrounding counties, except that projects in metropolitan counties may not be used as a source of data for projects in rural counties and vice versa. 47 Fed.Reg. at 23,655 (to be codified at 29 C.F.R. § 1.7(b)). The target of the unions' attack in this case is the final

proviso regarding exclusion of urban counties from rural wage determinations,[1] which the unions assert is a departure from longstanding administrative practice and inconsistent with congressional intent. Neither party questions the Secretary's basic claim of authority to look beyond the county line if necessary to determine the prevailing wage in the county in which the project is located. Because the basis for this general recognition of administrative authority is not entirely obvious, and because it is important to our upholding the new regulation, some discussion of it is warranted.

The language of the statute instructs the Secretary to determine the wages that are prevailing for classes of laborers and mechanics "employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed." 40 U.S.C. § 276a(a) (1976). Although on its face this language would appear to refer the Secretary only to projects in the same civil subdivision as the contract work, no one has interpreted it that way. Since at least 1935, the Secretary has routinely looked to nearby locales if there was insufficient prior construction in the project county to determine a prevailing wage. *See, e.g.*, Labor Department Regulation No. 503 § 7(2) (1935), *reprinted in* J.A. at 182 (if there has been no similar construction in county in recent years, "the report shall cover wage conditions in the nearest large city"); 29 C.F.R. § 1.8(b) (1982) (if no similar construction in area, "wage rate paid on the nearest similar construction may be considered"); 21 Fed.Reg. 5801, 5802 (1956) (same). Further, as noted, neither the parties nor the amici here seriously dispute that construction.

---

[1] Since there is usually enough similar construction in metropolitan areas to provide data necessary to make a wage determination, the proviso would generally affect wage determinations only in rural areas, where there tends to be less construction.

Most important, the legislative history of the statute suggests that Congress contemplated that the Secretary's authority to determine prevailing wages extended to finding the best way to do so. The Davis-Bacon Act itself and the 1935 amendments passed through both houses of Congress with no discussion of the problem of how the prevailing wage would be determined in villages too small to have a settled wage for the various crafts needed. However, during the House debate on the vetoed 1932 amendments, which were substantially identical to the 1935 amendments on this point, the floor manager, Representative Connery of Massachusetts, addressed the question:

> Mr. O'CONNOR. But there may be many villages that have no plumbers in them, men actually working as plumbers. Bricklayers and metal workers and other highly skilled trades may not be found in a village in sufficient numbers to enable the Secretary of Labor to establish a prevailing rate of wage.
>
> Mr. CONNERY. I think the Secretary of Labor, when he figures out these predetermined rates of wages, will be able to determine that. Generally there is a town near enough to ascertain the prevailing rate of wage for that town. If there is a job in a little town in New York, there will be a city near enough in order to determine the prevailing rate of wage for that little town.
>
> Mr. O'CONNOR. But the bill reads "in the city, town, or village where the public work is carried on." [2]
>
> Mr. CONNERY. As a practical matter, they have had no trouble in that regard in connection with the Davis-Bacon bill.

---

[2] The bill actually read "in the city, town, village, or other civil subdivision of any State or Territories in which all or the principal part of the particular contract work is located." 75 CONG.REC. 12,363 (1932) (first reading of S. 3847).

> Mr. O'CONNOR. If they limit it to the language in this bill, there may be trouble about it.
>
> Mr. CONNERY. In the Davis-Bacon bill there is the same proposition, and they have been getting along.

75 CONG.REC. 12,366 (1932). *See also id.* at 12,377 (remarks of Rep. Connery) ("The only practical way the committee found [to determine the prevailing wage in towns without wage scales] was that if you had a small town between two large cities they would take the prevailing wage scale of those two cities.").

This passage, while not crystal clear, suggests that Congress did not view the language in the statute as foreclosing the Secretary from implementing the Act in the way necessary to achieve its purposes. Clearly, if a prevailing wage could not be set in a given county by looking only to projects in that county, it was essential to the attainment of the general purpose of Congress—the predetermination of locally prevailing wages—that another mechanism be found. In essence, Congress anticipated that the general authorization to the Secretary to set the prevailing wage would encompass the power to find a way to do so in the interstitial areas not specifically provided for in the statute. *Cf. generally Permian Basin Rate Cases*, 390 U.S. 747, 780, 88 S.Ct. 1344, 1366, 20 L.Ed.2d 312 (1968) ("we are, in the absence of compelling evidence that such was Congress' intention, unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes.").

In cases where there is insufficient data from a given civil subdivision to determine a prevailing wage, therefore, the Secretary is acting pursuant to the same kind of delegation of authority that we discussed above with regard to the formula for deriving a prevailing wage from the data collected, *see supra* p. 616. We thus do not think, as the unions appear to argue, that Congress intended to

bind the Secretary to the method suggested by Representative Connery—adopting for rural areas the prevailing wages of the nearest city. The thrust of the passage is that the entire question was left to the Secretary. Representative Connery's suggestion was apparently intended merely to show that some method of determining a wage would be found. Moreover, no language was inserted into the statute that would implement the suggestion, as one might expect for so specific an instruction.

We review the Secretary's choice of methods only to ensure that he is acting consistently with the purposes of the statute and that his choice is not arbitrary. We think it clear that the new regulation is rational and furthers the purposes of the statute. The Secretary's justification for the provision was that, because of the disparity between urban and rural wages, using demographically dissimilar counties for such determinations is unreliable. 46 Fed.Reg. 41,443, 42,445 (1981) (proposed rulemaking). Furthermore, the Secretary claimed, importation of high urban wages to rural areas has disrupted labor relations in rural areas because employees have been unwilling to return to their usual pay scales after a Davis-Bacon project has been completed. *See* 47 Fed.Reg. at 23,647. His answer to the unions' argument that higher urban wages are justified in nearby rural areas because it is the urban workers who often do the work was that if that is generally true the wage scales for the surrounding rural counties would reflect that. *Id.* All of this makes sense, and the new regulation has not been shown to undermine the central purpose of the statute, which is to ensure that federal contractors pay the wages prevailing in the locality of the project. While it might be true that in some cases the reference rural counties might be more distant from the urban center than the project county, and that looking to them thus would not reveal the higher wages that should be paid in the project county, the bare allegation of that fact cannot overturn the Secretary's informed

exercise of authority in an area in which he has considerable expertise and discretion.

The District Court relied exclusively or almost exclusively on what it saw as a longstanding and consistent administrative practice contrary to the proposed regulations in striking down the rural-urban wage determination provision and the exclusion of federal projects from wage determinations, *see infra* pp. 619-22. *See* 553 F.Supp. at 353-54; 543 F.Supp. at 1286-87. It should be noted first that with regard to the exclusion of urban data from rural determinations the administrative practice has not been quite as consistent as the District Court, in the rush of its expedited proceedings, appears to have been told. At least since 1977, the Secretary's Manual of Operations for Issuance of Wage Determinations Under the Davis-Bacon and Related Acts has provided that "[g]enerally, a metropolitan county should not be used to obtain data for a rural county (or visa [sic] versa)." J.A. at 104. Moreover, it is not only the present administration, but also that of President Carter, that has sought to formalize this practice in new regulations. *See* 46 Fed.Reg. 4305, 4314 (1981) (final rule) (providing for exclusion of metropolitan counties except in "extraordinary circumstances"), *stayed*, 46 Fed.Reg. 11,253 (1981), *and replaced*, 47 Fed. Reg. 23,643 (1982).

More fundamentally, our disagreement with the District Court's heavy reliance on administrative practice stems from our view that in promulgating these two rules—excluding urban data from rural wage determinations and excluding federal projects from all wage determinations—the Secretary was acting in an area as to which he had some discretion to reach a number of different results rather than an area of pure statutory interpretation as to which there is in theory only a single answer. As the District Court recognized, *see* 543 F.Supp. at 1290, prior administrative practice carries much less weight when reviewing an action taken in the area of discretion, when

little more than clear statement is required, than when reviewing an action in the field of interpretation, where it is thought that the agency's contemporaneous and consistent interpretation of one of its enabling statutes is reliable evidence of what Congress intended. *Compare CBS v. FCC*, 454 F.2d 1018, 1026 (D.C.Cir.1971) (decision under discretionary "public interest" standard), *and Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir.1970) (same), *cert. denied*, 403 U.S. 923, 891 S.Ct. 2233, 29 L.Ed.2d 701 (1971), *with United States v. Leslie Salt Co.*, 350 U.S. 383, 395-97, 76 S.Ct. 416, 423-24, 100 L.Ed. 441 (1956) (interpreting statutory terms "debenture" and "certificate of indebtedness").

C. *Exclusion of Federal Projects from Wage Determinations*

The new regulations make a more dramatic break with the past in excluding from the prevailing-wage calculation prior federal or federally assisted projects subject to the Davis-Bacon Act's prevailing wage requirements. The new rules provide that such projects are not to be considered in wage determinations for building and residential construction projects "unless it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data." 47 Fed.Reg. at 23,652 (to be codified at 29 C.F.R. § 1.3(d)). The provision will not apply to highway and heavy construction projects, *id.*, where there is little nonfederal construction.[3]

---

[3] The Manual of Operations for Issuance of Wage Determinations Under the Davis-Bacon and Related Acts defines "residential construction" as "the construction, alteration, or repair of single family houses or apartment buildings of no more than four (4) stories in height"; "building construction" is other construction of "sheltered enclosures with walk-in access"; "highway construction" means more or less what it says; and "heavy construction" is a catch-all category that includes such major projects as dams, railroads, ski tows, subways, and canals. J.A. at 100-02.

The Secretary's rationale for the provision is that including federal projects in the wage determination skews the survey results upward, contrary to the purpose of Congress. *See id.* at 23,645. Neither the District Court opinion nor the unions dispute the factual basis for this conclusion. Rather, the unions argue that the Act and its legislative history, including congressional acquiescence to administrative practice, forbid exclusion of federal projects.

The language of the statute on this point refers to the wages determined to be prevailing for laborers and mechanics employed "on projects of a character similar to the contract work." 40 U.S.C. § 276a(a) (1976). The unions point out, quoting the District Court's opinion, that this language mandates the Secretary to consider "projects of a character similar," not "*private* projects of a character similar." *See* 543 F.Supp. at 1286. Leaving to one side the question of whether this point would *require* the Secretary to consider wages paid on federal projects if it no longer served the purposes of the statute to do so, there is substantial evidence in the legislative history and, more importantly, in the premises of the Act, that suggests that Congress did not intend wages on federal projects to be considered at all.

First, both the Senate and House reports to the original 1931 bill open, after a summary recommendation that the bill pass, with the following description of its purpose: "The purpose of this measure is to require contractors and subcontractors engaged in constructing, altering, or repairing any public building of the United States . . . to pay their employees the prevailing wage rates when such wage rates have been established by *private industry*." S.REP. NO. 1445, *supra* p. 614, at 1 (emphasis added); H.R.REP. NO. 2453, 71st Cong., 3d Sess. 1 (1931) (emphasis added). When the Act was introduced onto the floor of the House, and several times during the debate, the purpose to have federal wages mirror those in private

industry was reiterated. 74 CONG.REC. 6505 (1931) (remarks of Rep. Welch); *id.* at 6515 (Rep. Kopp) ("This bill simply requires the contractors not to pay less than is paid in private industry."); *id.* at 6520 (Rep. Zihlman). (There was practically no debate on the bill in the Senate. *See id.* at 3918-19.)

We might be reluctant to rely on these somewhat offhand and isolated remarks in the legislative history were it not that they so plainly reflect the true purpose of the Act. The premise underlying the statute was that there was something wrong with the federal bidding process that prevented the government from achieving subsidiary goals of its construction program that a private contractor might be able to attain. Because federal projects were required by statute to be awarded to the lowest bidder, the government could not, as a private builder might, require that fair wages be paid on the project in order to be sure of quality workmanship, to ensure against labor strife, to maintain its name in the community, or, in the case of the federal government, to pursue equitable distribution of public construction monies. Such substandard wages might also have been more prevalent on federal projects because of their national sponsorship, which might have made them more likely to attract unscrupulous pricecutters than a private, local builder, advertising locally, would have been. Whatever the reason, the result was that workers on government building projects were being paid less than their counterparts in neighboring private projects. Thus, the 1931 committee reports state:

> The Federal Government must, under the law, award its contracts to the lowest responsible bidder. This has prevented representatives of the departments involved from requiring successful bidders to pay wages to their employees comparable to the wages paid for similar labor by private industry in the vicinity of the building projects under construction.

S.REP. NO. 1445, *supra* p. 614, at 2; H.R.REP. NO. 2453, *supra* p. 620, at 1-2; *see also* S.REP. NO. 332, *supra* p. 613, at 8 (reviewing legislative history of the Act) (the problem of contractors paying below prior prevailing wage and transporting cheap labor to jobs "was particularly true of Government contracts where competitive bidding was in effect"); *Regulation of Wages Paid to Employees by Contractors Awarded Government Building Contracts: Hearings on H.R. 12, 122, 7005, 7254, and H.J.Res. 38 Before the House Comm. on Labor*, 72d Cong., 1st Sess. 15 (1932) (testimony of AFL President William Green) ("Because contractors seeking and securing Government contracts attempted to exploit workers and pay them a rate of wages that was far below the prevailing rate in private industries in the respective localities where buildings were erected, we strongly appealed to the Congress to enact this prevailing rate of wage law."); *cf. id.* at 63 (testimony of a general contractor) ("[I]n river and harbor work . . . I will guarantee [that] our company and all the private companies are paying higher wages to the dredge men than the Government is" when it acts as its own contractor.). *See generally supra* pp. 613-14 (discussion of purposes of Act).

With this as the Act's premise, it would make no sense to *require* the Secretary, when setting prevailing wages, to include federal projects in his survey. Since the problem to be remedied was the low wages paid on federal projects, to include them would only impede attainment of the ultimate goal of counterbalancing the flaws in the federal bidding system and equalizing federal and private wages.

The fact that the Secretary almost immediately began including federal projects in his wage surveys does not cast doubt upon this reading of congressional intent. The unions acknowledge that the Secretary did so, as the District Court put it, "notwithstanding the congressional mandate," only because as the Depression deepened there

was very little private construction from which to derive a private prevailing wage. 543 F.Supp. at 1286. Therefore, what the unions must argue is that Congress, in its refusal in the 1935 amendments to bar the Secretary from using federal data, not only acquiesced in such use but affirmatively required it.

What the unions and the District Court point to as evidence that Congress intended to mandate the practice is the change in the statutory language from wages "for work of a similar nature" in the 1931 Act to wages "for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work" in the 1935 amendments. *Compare* Davis-Bacon Act, ch. 411, § 1, 46 Stat. 1494 (1931) *with* 40 U.S.C. § 276a(a) (1976). What types of projects, the argument goes, could be more "of a character similar to the contract work" than federal ones?

The legislative history is very specific as to the intent of this change. After the passage of the 1931 Act, it developed that craftsmen in some industries were paid more than employees performing the same craft in other industries. In the 1932 House hearings, one witness gave the examples of riveters and electricians in the general building industry who would receive a higher wage, but would be employed far less steadily, than their brethren in the shipbuilding field. *Regulation of Wages Paid to Employees by Contractors Awarded Government Building Contracts: Hearings on S. 3847 and H.R. 11,865 Before the House Comm. on Labor*, 72d Cong., 1st Sess. 67 (1932) [hereinafter cited as *Hearings on S. 3847*] (testimony of shipbuilding trade representative, proposing addition of "in the same industry" to statute). To clarify that federal construction work wages should parallel the construction work wages prevailing in the area and not the shipbuilding wages, Congress added the language that the unions cite. The committee reports explain:

> A provision in the bill makes clear the meaning of the standard "prevailing . . . on work of a similar nature." The present language leaves some doubt as to whether the statute refers to wages in the same craft or wages paid on similar construction. The provision would make the wage rates contained in the specifications conform to those "prevailing" for "the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work."

H.R.REP. No. 1756, 74th Cong., 1st Sess. 3 (1935); *accord* S.REP. No. 1155, 74th Cong., 1st Sess. 3 (1935).

It was thus no part of Congress's intent to require the Secretary to include federal projects in his wage surveys. Excluding such data was the path most consistent with the purposes of the statute. The Secretary nevertheless exercised his discretion to include these projects as a necessary expedient during the Depression in order to achieve the ends of Congress. *See generally supra* p. 618 (implied power to take action imperative for the achievement of the statute's purpose). To continue to include them now that federal wages are far above those paid in the private sector, however, would only exacerbate in the opposite direction the kind of problem—an inequality between federal and private wages—Congress was seeking to avoid. The fact that no Secretary has previously abandoned the practice does not take away from the current Secretary's power to fine tune his exercise of discretion.

D. *Expanded Use of Helpers*

Under current practice, the Secretary recognizes five classes of employees covered by the Act: skilled journeymen; unskilled laborers; and semiskilled apprentices, trainees, and helpers. The journeyman and laborer classes are well-defined and universally recognized; the former is generally identified with the traditional crafts, such as electrician or roofer, and often defined by whether the

employee uses the tools of the trade. Apprentices and trainees, as the terms imply, are employees learning the journeyman's craft and therefore are permitted to do some traditional journeyman's work, but they must be enrolled in a formal apprenticeship or trainee program approved by the Secretary. *See* 29 C.F.R. §§ 5.2(c), 5.5(a)(4), 5.15 (1982). The Secretary currently recognizes a helper classification only if (1) the scope of the helpers' duties—meaning the physical tasks performed—is defined and can be differentiated from that of journeyman duties, and (2) the particular helper classification prevails in the area. *See* 47 Fed.Reg. at 23,647, 23,649, 23,659; *DeNarde Construction Co.*, Case No. 78-3, at 2 (Wage Appeals Bd. May 14, 1979), *reprinted in* Plaintiffs' Reply Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment, exhibit 2, Record at 14.[4]

The new regulations would alter both of these limitations on the use of helpers on federal construction jobs. First, they would allow some overlap between the duties

---

[4] Occasionally, but not always, a third criterion for recognition of a helper classification is mentioned: "the helper is not used as an informal apprentice or trainee." 47 Fed.Reg. at 23,649. *But see id.* at 23,647, 23,659 (not mentioned); *DeNarde* (same). This criterion appears to have been eliminated in the new regulations. The parties have not focused on it, however, and therefore neither do we.

The requirement that a classification be prevailing in an area also applies to journeymen and laborers, but appears not to apply to apprentices and trainees. *See* 29 C.F.R. § 1.2(a) (1982) (Secretary sets prevailing wage rate "for each classification of laborers and mechanics which [he] shall regard as prevailing in an area"); *id.* § 5.5(a)(4)(i) (apprentices permitted to earn less than predetermined wage for the work they perform, if they are registered); *id.* § 5.5(a)(4)(ii) (same for trainees). The new regulations would eliminate the prevailing-in-the-area requirement for journeymen and laborers, *see* 47 Fed.Reg. at 23,655 (to be codified at 29 C.F.R. § 1.7(d)) ("Classifications and wage rates will be issued for identifiable 'classes of laborers and mechanics.'"), but the unions do not complain about this provision.

of helpers and those of journeymen. While some distinction between skilled and semiskilled tasks would be retained, the essential functional distinction would be not the nature of the task done but rather the subordinate position of the helper vis-a-vis a journeyman. The new classification would be defined as follows:

> A "helper" is a semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and holding materials or tools; and other related, semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice.

47 Fed.Reg. at 23,667 (to be codified at 29 C.F.R. § 5.2 (n)(4)); *see also id.* at 23,668 (to be codified at 29 C.F.R. § 5.5(a)(1)(ii)(A)(1)) (when new categories not listed in wage determination are added to contracts, work to be performed by new classifications must not be performed by any existing classification, except as to helpers.). The second major change in the permitted use of helpers is that any given helper classification would need to be only "identifiable," rather than "prevailing," in the area in order to be included in the wage determination for a project. *Id.* at 23,655 (to be codified at 29 C.F.R. § 1.7(d)).

In addition, the new regulations would provide a new numerical limitation on the use of helpers under which there could be no more than two helpers for every three journeymen, i.e., a maximum of forty percent of the total

number of helpers and journeymen could be helpers. *Id.* at 23,670 (to be codified at 29 C.F.R. § 5.5(a)(4)(iv)). Also, if a worker listed on the payroll as a helper performed duties outside the definition provided in the regulations, or exceeded the forty-percent limitation, the worker would have to be paid the applicable wage for the work he or she actually did. *Id.*[5]

The Secretary's rationale for allowing expanded use of helpers was that the present limitations do not reflect "the widespread industry practice" of employing both particular craft and general utility helpers on construction projects. *Id.* at 23,647. The Secretary estimated that the expanded use of helpers would save the government $363.16 million in construction costs. *Id.* at 23,651. In addition, he stated, the new rules would increase job opportunities for less skilled workers, including young people, women, and minorities; encourage training; increase productivity; and enable more contractors to compete for government work. *Id.*

This last reason is presumably based on the fact that unions have historically permitted very limited use of helpers, seeking instead to ensure demand for skilled journeymen and the integrity of the apprenticeship route to that position. *See, e.g., id.* at 23,651 ("there are few helpers in union firms"); A. THIEBLOT, THE DAVIS-BACON ACT 154 (1975), *reprinted in* Record at 3893, 3978 (71.1% of nonunion contractors and 16.1% of union contractors surveyed use helpers for various crafts); S. SLICHTER, UNION POLICIES AND INDUSTRIAL MANAGEMENT

---

[5] There are two other provisions that would apply to the use of helpers. First, an existing contract that does not contain a helper classification could be altered to allow the expanded use permitted by the new regulations. *Id.* at 23,668 (to be codified at 29 C.F.R. § 5.5(a)(1)(ii)(A)). Second, variances from the 40% rule could be obtained in areas where the current practice allows use of helpers in excess of forty percent of the total number of helpers and journeymen. *See id.* at 23,659.

46 (1941) ("The building trades . . . undertake to prevent helpers from becoming competitors of journeymen by regulating the work of the helper in such a way that he does not have an opportunity to learn the trade," such as by prohibiting him from using the tools of the trade.); Affidavit of Herbert R. Northrop (Wharton School Professor of Industry), J.A. at 108 ("More efficient deployment of labor [such as by allowing extensive use of helpers] is one reason why open shop construction today controls 65 percent of all construction . . . ."); Affidavit of Robert A. Georgine (President, AFL-CIO Bldg. & Constr. Trades Dept.), J.A. at 122-23 (collective bargaining agreements preclude many contractors from taking advantage of the changes in the new regulations). Apparently, the Secretary believes that more nonunion contractors would be able to compete for government jobs under the new regulations because they would be able to use the employee classification system that they are accustomed to using. *See* Affidavit of John L. Fiedler (construction firm president), J.A. at 114 ("[A] contractor who regularly uses helpers on privately funded construction work must reclassify helpers when he does work subject to the Davis-Bacon Act. . . . [T]his is economically unwise, since the productivity of the worker is not commensurate with his wage. Therefore, many merit shop contractors are deterred from performing federal or federally assisted construction contracts.").[6]

---

[6] It is unclear whether the Secretary, in finding that more contractors would be able to compete for government work under the new rules, simply ignored the likely decrease in the number of unionized contractors who would be able to compete for such work, *see* Affidavit of Robert A. Georgine, *supra*, J.A. at 122-23, or instead believed that that decrease would be more than offset by the increase in nonunion bidders.

The unions disputed many of the claimed benefits of the expanded use of helpers, arguing *inter alia* that the new rules would discourage apprenticeship and training programs because contractors would find it easier simply to hire helpers to fulfill their need for semi-skilled labor rather than set up a formal program. Because helpers

We consider first the provision that a helper classification need only be "identifiable" in an area to be used, and second the enlarged definition of a helper's duties.[7]

1. *"Identifiable" Classifications*

The provision requiring that a helper classification need only be "identifiable" in an area must be struck down because it operates to undermine the fundamental purpose of the Act: that wages on federal construction projects mirror those locally prevailing. We think it plain that, in the scheme of the Act, either of two methods will serve to lower the wages paid for certain work below those paid for the same work in the surrounding community. First, the work may be classified as it is in the community—as,

---

receive far less training than do apprentices, the unions argued, the new rules would tend to deny advancement to minorities, young people, and women, and would lead to a shortage of skilled craftsmen. *See, e.g.*, 47 Fed.Reg. at 23,647; Affidavit of Ray Marshall (former Labor Secretary), J.A. at 133, 138-40. In this court, the unions rely largely on the argument that the new regulations are directly contrary to the language and intent of the statute rather than on the ill effects of the changes.

[7] The District Court enjoined the operation of all the new regulations governing the use of helpers, including the 40% rule, the procedure for conforming existing contracts to the new regulations, and the procedure for a variance from the 40% rule for certain existing projects. *See* 543 F.Supp. at 1292 (preliminary injunction); 553 F.Supp. at 356 (permanent injunction). Nevertheless, like the unions in this court, the District Court only discussed the expanded definition of "helper" and the provision that a helper classification need only be "identifiable" in an area to be used. Evidently, the court regarded the helper provisions as a package, the essential elements of which were the two that it discussed; once those were struck down, there was no need to deal with the others since the Secretary would surely redraft the package, perhaps changing the minor aspects of it in the process. Not having the benefit of any significant discussion of the issues, we decline to rule on these aspects of the helper provision. Should the Secretary include them in any reissued rules, we will not be barred from considering them then.

say "carpenter work"—but a lower wage may be paid for that classification than is paid in the community. Second, the same wage rate may be set for each job classification, but the work may be classified in a lower paying category—such as "carpenter's helper work"—than it is in the community. Thus, if a given lower paid job classification need only be "identifiable" in the community to be used on a government construction site, the wages paid for some work may well be less than those "prevailing" for that work in the community. To take a simplified example, suppose that unions dominate the construction industry in a certain city and require that any worker using carpenters' tools be a journeyman carpenter or apprentice. Nevertheless, suppose that one or two non-union firms in the city use lower paid carpenter's helpers to rough-cut beams. In that case, a federal project that permitted workers who rough-cut beams to be termed "carpenter's helpers," because such a classification could be "identified" in the city, would not be paying the wage prevailing for the corresponding class of workers in that city. The prevailing wage for that kind of work would actually be the union wage for journeyman carpenters or apprentices.

We need not rely merely on logic to know that use of a less-than-prevailing classification may result in payment of lower wages than those prevailing in the community for the same work, and that that is prohibited by the Act. Congress in 1935 was quite clear that it understood that "prevailing wage scales [could be] broken down by intermediate classification," S.REP. NO. 332, *supra* p. 613, pt. 3, at 12, and that such "underclassifi[cation]," *id.*, was an evasion of the Act. The Senate committee reviewing the operation of the law in 1935 described the problem as follows: "The act also fails to be explicit on the matter of classification, with the result that many contractors were able to circumvent the law by hiring mechanics as common laborers, and then assigning them to tasks which

fell within the purview of one of the skilled crafts." *Id.* pt. 2, at 5; *see also id.* at 2 (listing creation of "arbitrary classifications known as semi-skilled labor" as a method or device "to underpay labor" engaged on public works programs). The report gave the example of "rough 'saw and hammer' men" working on Public Works Administration projects who

> were paid at a rate considerably less than [the wages] prevailing for carpenters, although the work being performed was regarded by labor-union regulations as carpentry work. In a similar way, new grades and classifications sprang up all over the country, permitting high-grade skilled laborers to be placed in lower categories so that their rates of pay were less than those prevailing for skilled labor.

Id. pt. 3, at 12.

Although the 1935 committee recommended that the "classification" question "should be clarified by new legislation," *id.* pt. 2, at 5, it is not clear whether the statutory language regarding "classes of laborers and mechanics" was added with this in mind. *See infra* pp. 627-29. The House and Senate reports on the bill itself mention this language only with regard to the somewhat different problem of differing wages being paid for the same craft in different industries. H.R.REP. NO. 1756, *supra* p. 622, at 3; S.REP. NO. 1155; *supra* p. 622, at 3; *see supra* pp. 621-22. Nevertheless, various references in the legislative history strongly suggest that Congress thought either that such underclassification was already barred—for example, the earlier 1935 committee's references to contractors that "circumvent the law" and its conclusion that the law should be "clarified"—or that it certainly would be under the law as amended, *see Hearings on S. 3847*, *supra* p. 621, at 110 (remarks of Rep. Welch) ("If that were brought to the attention of the Secretary of Labor, if this bill were in full force and effect . . . .[he] would not permit it . . . .").

What is clear is that Congress regarded underclassification as contrary to the purposes, and most probably to the terms, of the Act. We have concluded that the Secretary's identifiable-classification regulation would virtually ensure underclassification in union-dominated areas. At least where the Secretary has not found the use of helpers as provided for in the new rules to be a nearly universal practice, *see* 47 Fed.Reg. at 23,647 (practice is merely "widespread"); Affidavit of John T. Dunlop (former Labor Secretary), J.A. at 188 ("The fact is that helpers exist in some areas and in some trades, and not in others."),[8] he is barred from allowing work that is "prevailing" categorized in one job classification to be placed in a lower paid classification merely because such a practice can be "identified" in the area.

2. *Definition of Helper Duties*

While we thus think it clear that the provision allowing use of helpers wherever the classification is "identifiable" must be struck down, whether the broadened definition of a helper's duties may stand is a far closer question. The issue is essentially this: if it is the prevailing practice in a community to allow lower paid but supervised helpers to undertake tasks that overlap with those of higher paid journeymen or laborers, may the Secretary allow that practice to be followed on federal projects in

[8] We do not here attempt to define all the circumstances under which a new class of employees must be prevailing in an area before the Secretary may allow its use. We merely suggest that there *may* be some circumstances in which, perhaps for reasons of administrative convenience or because of a need to further some other congressionally expressed policy, *e.g.*, National Apprenticeship Act, 29 U.S.C. § 50 (1976) (Secretary is directed "to bring together employers and labor for the formulation of programs of apprenticeship"), or for other reasons, the Secretary could provide for classifications that do not prevail in a certain area. No such reason appears here. The propriety of eliminating the requirement that classifications of journeymen and laborers be prevailing in an area is not before us. *See supra* note 4.

that town? The central objection to the Secretary's new regulation is that it would no longer define the "classes" of laborers and mechanics by the tasks a particular employee does, but rather in large part by whether he or she is acting under the supervision of a journeyman. *See* 553 F.Supp. at 355 ("the new regulations would allow helpers . . . to perform tasks of all sorts"); 543 F.Supp. at 1285 ("Under the new regulations, helpers not only are not defined in traditional terms, but they may perform any task throughout the entire construction field . . . .").[9]

---

[9] A more fundamental objection to the Secretary's new regulations might be that the Davis-Bacon Act does not contemplate any semiskilled labor classifications whatsoever. This objection, not clearly pressed on us, *see infra*, would be based primarily on the fact that the statute speaks only of "laborers and mechanics," and not of "helpers." There is some legislative history supporting such an interpretation of the statute. For example, the report of the Senate committee investigating the operation of the Act in 1935 cited the following practice as a "device[] . . . to underpay labor":

> Instances of failure by Federal Emergency Relief Administration officials to pay the prevailing wage on Public Works projects, and *the creation by such officials of arbitrary classifications known as semiskilled labor specifically prohibited by the Federal Emergency Relief Administration regulations.*

S.REP. No. 332, *supra* p. 613, pt. 2, at 2 (emphasis added).

There are, however, indications elsewhere in the legislative history that Congress used the term "laborers and mechanics" to mean all manual workers on construction sites, and not to exclude semiskilled employees. For example, at the end of the part of the Senate report just quoted, the committee recommended amendment of the Act so that it would require that the specifications for any project which "involve[d] the employment of *mechanics and/or laborers* . . . contain a provision stating the minimum wages to be paid *various classes of skilled, unskilled, and intermediate labor*," and that the contracts for such projects obligate the contractor to pay "all mechanics and laborers employed" the wages in the specifications. *Id.* at 9 (emphasis added). Since it would make no sense to set wages for intermediate or semiskilled workers if they were not to be covered by the Act, it appears that the committee thought the term "mechanics and laborers" included some intermediate classifications other than skilled and unskilled labor. (The language "skilled, unskilled, and intermediate labor" was replaced by the phrase "labor-

There is some legislative history that suggests that Congress in 1935 was thinking of a task-based definition of "classes" when it spoke of the problem of "under-

---

ers and mechanics" before the amendments were enacted, but no explanation of the change appears. The change may have been intended merely to make the language of the statute, which refers to "laborers and mechanics" thirteen other times, consistent throughout. In any case, the fact that the two phrases could appear so close together in a considered committee recommendation in which they must be read to refer to the same categories of workers suggests that it was not assumed by all that the two were contradictory.) Moreover, elsewhere in its report the committee plainly used the term "laborers and mechanics" to mean manual workers generally, with no thought of excluding semiskilled workers. *See, e.g., id.* at 1 ("public hearings were conducted and testimony of 100 witnesses (*laborers and mechanics*, representatives of labor, contractors, and representatives of various Government departments) was received") (emphasis added).

In addition, it appears that the Federal Emergency Relief Administration (FERA) regulations referred to in the Senate report themselves recognized semiskilled labor classifications, the wage rates for which were to "depend upon local custom." Federal Civil Workers Administration Rules and Regulations No. 10 at 2 (1933), *reprinted in* J.A. at 198 (the Civil Works Administration was an arm of the FERA). Thus, what the committee referred to as a device to underpay labor in violation of the FERA regulations must not have been the use of intermediate classifications per se, but the "creation" of "arbitrary" semiskilled classifications not reflected in local practice, in order to underpay skilled labor.

Further support for a reading of the statute that does not bar the use of semiskilled classifications entirely is provided by the Secretary's longstanding interpretation of the Act to allow at least a limited use of helpers. *See supra* p. 622. Also, the District Court in this case clearly thought the current use of helpers was permitted by the Act. *See* 543 F.Supp. at 1285. Moreover, the unions in this court appear not to quarrel with this view, for they quote the District Court's opinion at length and endorse its conclusions, *see* Brief for Appellees-Cross-Appellants at 31-33; elsewhere they argue that Congress's intent in this regard "had been consistently recognized and followed by the Secretary of Labor" until the challenged regulations, *id.* at 43. *But see id.* at 38-39 (disputing the government's view that the Senate committee accepted the use of legitimate semiskilled classifications). (The unions' position was

classification." For example, the 1935 Senate committee considering the operation of the Act described the problem of contractors assigning to common laborers "*tasks* which fell within the purview of the skilled crafts," *see supra* p. 625 (emphasis added), and referred to the "rough saw and hammer men" category as a violation of the rule that "any man using carpenter's tools shall be paid carpenter's wages," S.REP. NO. 332, *supra* p. 613, pt. 3, at 17.

Nevertheless, we do not think Congress intended to bind the Secretary to the job classification existing at that time, but rather merely spoke against a background of the task-based union practice being the prevailing one. The Senate report seems to take some pains to point out that the reason the "rough saw and hammer men" classification resulted in underpayment of labor was that it was "a direct violation of the union rule *in general effect throughout the country*," *id.* (emphasis added); *see id.* at 12 (the work being performed "was regarded by labor-union regulations as carpentry work").

Moreover, there is no language in the statute that might be said to implement the supposed intent to mandate the union classification scheme. The only otherwise

---

unequivocally stated in their memoranda filed in the District Court: "[W]e do not take the position that Congress *precluded* recognition of semiskilled helpers under the Davis-Bacon Act. . . . Quite clearly, the Davis-Bacon Act does allow recognition of semi-skilled workers when they do, in fact, represent a prevailing practice and form a *distinguishable* class who perform discrete tasks." Plaintiffs' Reply Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment at 10, 11, Record at 14 (emphasis in original.)

While we think the argument that any helper classifications was barred by the statute is at least colorable, the long-held view of the Secretary and the legislative history of the statute taken as a whole persuade us to agree that the Secretary is empowered to recognize at least some form of semiskilled classification. The remainder of the present section considers whether the specific definition of "helper" proposed by the Secretary is barred by the statute.

unexplained change worked by the 1935 amendments was the addition of the phrases "*various classes* of laborers and mechanics" and "*corresponding classes* of laborers and mechanics" in place of the 1931 reference to the rate of wage for "*all* laborers and mechanics." We see nothing inherently task-oriented about the term "classes." It seems likely that the addition of the word "classes" was intended merely to describe in a general way the nature of the wage predetermination the Secretary was to make under the new statute. Had the amendments required only that advertisements for bids contain "a provision stating the minimum wages to be paid all laborers and mechanics which shall be based upon the wages . . . prevailing for work of a similar nature," it might conceivably have been thought that a single minimum wage was to be set for construction work rather than a set of wages for the various classes or grades of workers involved.[10]

---

[10] The vetoed 1932 act contained the term "grades" instead of "classes." The legislative history does not reveal the reason for the change, although it may have been to counter an interpretation of the word "grades" that was advanced by President Hoover's Secretary of Labor in a memorandum that accompanied the President's veto message. Secretary Doak wrote that the new law would

> require[] the determination of the rate of wages for the "various grades of mechanics and laborers," clearly indicating that the rate is to be determined not only for the different trades, as bricklayers and carpenters, but for the different grades of such workers within each trade, which would require an official determination of the comparative efficiency of individual workers employed on the work by the contractor or subcontractor.

75 CONG.REC. 14,589 (1932). The new term "classes" may have been inserted to assure that qualitative evaluations of workers within a certain type need not be made. Prior to the 1932 act, concerns about underclassification were voiced similar to those expressed prior to the 1935 amendments, *see Hearings on S. 3847*, *supra* p. 621, at 109 (testimony of shipbuilding trade representative) ("in the shipyards the line between the mechanic and the helper and the seimskilled man has been very largely broken down"), suggesting that the change from "grades" to "classes" was not intended to take into account new information c i underclassification.

Further evidence that Congress did not intend to mandate the then-existing union practice is that, as the unions here admit, Congress specifically rejected a scheme whereby wages would be set at the union wage in all areas. *See Wages of Laborers and Mechanics on Public Buildings: Hearing on S. 5904 Before the Senate Comm. on Manufacturers*, 71st Cong., 3d Sess. 9 (1931); Brief for Appellees-Cross-Appellants at 60; Reply Brief for Appellees-Cross-Appellants at 6. The following exchange during the House debate on the 1932 bill clearly indicates the congressional intent on the matter:

> Mr. JOHNSON of South Dakota. . . . I want to know if the union scale is to govern in all matters in this bill, particularly in those cities where I am convinced the racketeering end of union labor has taken control.
>
> Mr. CONNERY. The Secretary of Labor is the final arbiter, and I do not believe that he has taken the union scale absolutely. He has taken the prevailing rate of wage in those cities.
>
> Mr. JOHNSON of South Dakota. Then it would not be the intention of the chairman of the committee [Mr. Connery] that the union scale in all cases would be the prevailing rate?
>
> Mr. CONNERY. Personally, that is what I would like to see.
>
> Mr. JOHNSON of South Dakota. It would not be so construed in the bill if it is passed?
>
> Mr. CONNERY. No.

75 CONG.REC. 12,377 (1932); *accord id.* 12,379 (remarks of Rep. Ramspeck) (in some cases, the Secretary has not required the union scale). Since, as we have discussed, wage rates and classifications are essentially two sides of the same coin—they must be fixed in tandem to ensure that a given wage will be paid for given work—Congress's rejection of the then widespread union pay scale as the conclusive basis for the Secretary's predetermination of

wages suggests that it similarly favored locally prevailing practices over the union classification scheme.

At bottom, we are unwilling to read the fairly ambiguous legislative references to a task-based classification system in such a way as to vitiate the clearly expressed congressional purpose to have federal wages mirror those prevailing in the area. *See, e.g.*, S.REP. No. 509 72d Cong., 1st Sess. 2 (1932) ("This bill will in no way interfere with the natural increase or decrease of prevailing wage scales . . . ."); H.R.REP. No. 1756, *supra* p. 622, at 1 (The bill's "object is to reinforce and extend the principle of . . . the 'Bacon-Davis Act' . . . which requires the payment of the prevailing rate of wages to laborers and mechanics employed" on federal projects.); *see also* H.R.REP. No. 308, 88th Cong., 1st Sess. 2 (1963) (the Act "was designed . . . to prevent the disturbance of the local economy"). Yet were the Secretary barred in all cases from allowing helpers to do work that overlaps with the tasks done by journeymen, the wages paid on federal projects for certain work would sometimes not be the same as those prevailing in the area for the same work.

We do not say that there is no content to the statutory term "classes." *See generally* Donahue, *The Davis-Bacon Act and the Walsh-Healey Public Contracts Act: A Comparison of Coverage and Minimum Wage Provisions*, 29 LAW & CONTEMP. PROBS. 488, 508 (1964) (written by Labor Dep't Solicitor) ("[T]he Secretary generally takes the local corresponding classes of laborers and mechanics as he finds them, although he may not use criteria which detract from the term 'classes,' as used in the act."). We simply say that the core concept of that term—that those things within the class be differentiable from those things outside of it—is not weakened by a definition that makes the common element supervision by journeymen rather than use of tools.

The unions and the District Court present a subtler argument than one based on a direct congressional intent

to define "classes" in a certain way. They appear to agree that the legislative history discussed above suggests only that Congress was aware of the need to prevent workers doing skilled work from being underpaid by being classified as semiskilled employees. The "crux" of the argument, as the District Court put it, is that "in practice" the distinction between skilled and unskilled or semiskilled labor "can be maintained only if the tasks of the helper class are defined as discrete and distinguishable from those of laborers and mechanics." 553 F.Supp. at 355. The argument is, in other words, that as a practical matter the Secretary is wrong to think that his definition is capable of enforcement, because it is simply too difficult to tell a helper from a journeyman on a job site.

We agree that discerning whether a person using certain tools is being directed and supervised by a journeyman is far harder than merely telling whether that person is using the tools of the trade. Nevertheless, there is a substantial policy that argues against simply choosing a rough and simple distinction, and that is that such a distinction might mean the wage scales on federal work would no longer reflect the prevailing practice in the area, which would be counter to the central purpose of the Act. We think the Secretary is entitled to try to come closer to achieving that purpose than his predecessors have. *Cf. American Trucking Associations v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416, 87 S.Ct. 1608, 1618, 18 L.Ed.2d 847 (1967) ("[W]e agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice.").

The change may mean that some unscrupulous contractors will find it easier to shift what the prevailing practice denominates journeyman work onto helpers, but we find it difficult to second-guess the Secretary's view

that he can catch them. We do not mean that we cannot review the Secretary's decision against a charge that he has effectively abandoned the field. But our deference to his choice is properly near its greatest when his decision turns on the enforceability of various regulatory schemes. He and not the courts can best balance such shifting dynamics as the incentive to violate the rules, the willingness of construction workers and competitors to complain, the ability of his inspection staff to respond and to discover violations, and the effectiveness of sanctions. *See, e.g , FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596-97, 101 S.Ct. 1266, 1275-76, 67 L.Ed.2d 521 (1981) ("predictions as to the probable conduct of licensees and the functioning of the broadcasting market and . . . the Commission's assessment of its capacity to make the determinations required by [the alternative approach] . . . are within the institutional competence of the Commission").

Moreover, it is important to note that in this case the Secretary is not overturning a policy that has worked to perfection. He has concluded that "the current policies regarding semi-skilled crafts do not adequately reflect construction industry practices, in particular, the widespread use of helpers to perform certain craft tasks." 47 Fed. Reg. at 23,662. Perhaps as a result, federal wages today, rather than being below those in the private sector, are in some cases far above. *See* GENERAL ACCOUNTING OFFICE, THE DAVIS-BACON ACT SHOULD BE REPEALED 71 (1979) (on twelve projects where wage determinations were higher than GAO-determined prevailing rate, average difference was 36.8%). No one has attacked this basic finding. The fact that the past practice has not been entirely successful tends to predispose a reviewing court to allow the Secretary to try a different scheme that, while more difficult to enforce, might on balance result in a closer approximation of the prevailing wage. *See American Trucking Associations*, 387 U.S. at 416, 87

S.Ct. at 1618 (regulatory agencies are supposed "to adapt their rules and practices to the Nation's needs in a volatile, changing economy").

The Secretary's definition here is not clearly unreasonable or on its face impossible to enforce. First, the distinction between supervised and supervising personnel is a common one in the labor field. It is thus not a completely untested distinction nor one that has proven impossible to draw.

Second, the new regulation, as modified by the requirement that the classification prevail in an area before it may be used, is an entirely logical response to the problem of federal construction practice not reflecting the widespread, but not universal, practice of using helpers. The new regulation would lower the current federal wages for the most part in those nonunion areas where they are significantly above the wages paid in the area. *See, e.g.*, A. THIEBLOT, *supra* p. 623, at 94, *reprinted in* Record at 3948 (effect of 35-day suspension of Act in 1971 was "negligible" in highly unionized areas, but "often substantial" in nonunion areas). In the union areas of the country where helpers are little used, they would not be allowed on federal projects. Thus, the new regulation would be narrowly aimed at correcting the federal practice in areas where it has not worked well, and would not result in a wholesale reduction in journeyman wages.

Third, but by no means least important, the Secretary has increased the likelihood that gross violations will be caught, or at least that evasion will not get too far out of line, by putting the forty-percent cap on the use of helpers. While it might be desirable for the cap to reflect the extent of use in the area, rather than provide a single nationwide cutoff, the existence of some cap at least increases our confidence that the Secretary has considered the enforcement problems of the new definition and responded to them. *See* 46 Fed.Reg. at 41,456 (proposed 1:5 helpers-to-journeyman ratio was intended "to protect

against possible abuse").[11] All things considered, the unions have not shown the Secretary's choice of regulatory schemes to be arbitrary or capricious.

E. *Allowing Submission of Summary Statement of Compliance with Wage Laws*

The Secretary's present regulations require covered federal contractors and subcontractors to submit weekly a copy of their payrolls, listing the name and address of each laborer or mechanic, and his or her classification, rate of pay, daily and weekly hours worked, deductions made, and actual wages paid. 29 C.F.R. § 5.5(a)(3) (1982). With the exception of a three-year hiatus from 1948 to 1951, the regulations have continuously required the submission of such payrolls since 1935, immediately after the Copeland Anti-Kickback Act was passed. *See* Construction Regulations and Regulations Issued Pursuant to So-Called "Kick-Back Statute" pt. II (1935), *reprinted in* J.A. at 172, 178-79 [hereinafter cited as 1935 Kick-Back Regulations]; 13 Fed.Reg. 524 (1948) (eliminating the provision); 16 Fed.Reg. 4430, 4431 (1951) (reinstating the provision).

Initially the Copeland Act required a "sworn affidavit" with respect to the wages paid, so the regulations required that the payrolls be accompanied by an affidavit from the employer swearing that "the attached pay roll [was] . . . true and accurate" and that no unreported deduction or rebates had been made. 1935 Kick-Back Regulations, *supra* p. 630, pt. II, § 2, *reprinted in* J.A. at 178. In 1958, in a law to improve government procurement opportunities for small business concerns, the Copeland Act was amended to require a "statement" rather than a "sworn affidavit" and to make false statements

---

[11] We repeat that we have not been provided with a significant discussion of the issues regarding the 40% cutoff and therefore do not here pass on the propriety of it. *See supra* note 7.

a criminal offense. Act of Aug. 28, 1958, Pub.L. No. 85-800, § 12, 72 Stat. 967. The regulations thus now require that the payroll be accompanied by a statement indicating that the payroll is correct and complete, that the wage rates are not less than those determined by the Secretary, and that the classifications for each laborer or mechanic conform to the work done. 29 C.F.R. § 5.5(a)(3)(ii) (1982) (contract provision); *see id.* § 3.3 (regulatory requirement).

The new regulation would eliminate the requirement that payrolls be submitted, while maintaining the required weekly submission of a statement of compliance. The statement would certify that the payrolls the employer is required by the regulations to maintain are correct and complete, that each laborer or mechanic has been paid the full wages earned without impermissible deduction or rebate, and that the wage rates paid are the applicable ones for the classification of work performed. 47 Fed. Reg. at 23,669 (to be codified at 29 C.F.R. § 5.5(a)L(3)(ii)); *id.* at 23,679 (to be codified at 29 C.F.R. § 3.3(b)).

The Secretary justified the change as a reduction in unnecessary paperwork, since the submitted payrolls are "infrequently used by many Federal agencies." *Id.* at 23,662. He estimated that the elimination of the requirement would save $100 million in compliance costs. *Id.* The unions disputed the cost savings involved, arguing that the estimates ignored the enforcement benefits of the payroll reporting requirement. *Id.* In this court, the union also cite Labor Department testimony that the payrolls are typically reviewed at the beginning of each project and spot-checked thereafter, with contractors that have a history of violations receiving more thorough checks. *See Federal Contractors' Reporting Requirements: Hearing on S. 1681 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs*, 96th Cong., 1st

Sess. 18 (1979); *see also id.* at 147 (memorandum of HUD Inspector General) (contractor is less likely to underpay if he is required to submit weekly payroll reports). Since we find the Secretary's relaxation of the reporting requirement to be contrary to a direct statutory command, we need not reach the question of whether the payroll reporting requirement is, as the District Court found, "essential to the achievement of the Act's purposes" because of the transient nature of much construction business, 543 F.Supp. at 1288-89; *accord* 553 F.Supp. at 354 (new regulation "would render the act largely unenforceable").

We think that when Congress directed the Secretary to require contractors to "furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week," Copeland Anti-Kickback Act, ch. 482, § 2, 48 Stat. 948 (1934), it meant that the wages paid each employee should be separately reported and sworn to. Under the Secretary's reading of the statute, the intent of the reporting provision would be little more than to add a further criminal penalty—that of perjury —to the crime of underpaying one's employees. We think the reporting provision was intended to play, in addition, a role in uncovering violations of the law. The most persuasive evidence of this is, of course, the word "each" and the requirement that the submission be "weekly." If the provision were meant only to add perjury to the criminal penalties provided by section 1 of the act, then it would seem unnecessary to have the affidavit refer to "each" employee since a statement as to all of them would presumably be untrue if any one was underpaid. Under the Secretary's reading, it would also seem to be unnecessary to require a "weekly" submission, since a blanket statement at the end of the contract term would serve to criminalize any single breach during construction. Both of these provisions are most naturally read if one attaches an investigatory purpose to the act, that is, if the requirement was intended to aid in uncovering, not

merely punishing, violations. Only a requirement that payrolls be submitted would help uncover violations, either by exposing contractors who accurately reported underpayments or by simplifying the task of investigators in spot-checking for violations or turning up unusual patterns.

Further support for this reading is provided by the initial phrase of the section in the original act, which read, "To aid in the enforcement of the above section." The "above section," section 1 of the act, made it a criminal offense to induce an employee to give up any part of the compensation to which he or she is entitled. Section 2 would only really "aid in the enforcement" of section 1's criminal provision if it helped catch violators rather than if it merely added to the underlying conduct a further penalty with apparently the same or greater elements of proof.

The legislative history of the act does not contradict, and to a large extent supports, this reading of the statutory language. The affidavit provision was not mentioned in the committee reports or on the floor of the House, where there was no debate on the act at all. There was also no debate in the Senate, except that Senator Copeland briefly introduced the bill, stating in part,

> It is the purpose of the bill to have the Secretary . . . require that an affidavit be made as to the pay roll each week so that we may have some way of reaching those who may be guilty of this practice [of requiring kickbacks from employees].

78 CONG.REC. 7401 (1934). While the words "as to" slightly support the Secretary's view that only a generalized affidavit *about* the wages paid was required, the mention of the weekly "pay roll" tends to support the unions' view that a sworn copy of the payroll was required. Further support for the latter position is provided by the stated purpose of providing "some way of

reaching those who may be guilty of this practice." The word "reaching" must have meant "uncovering," supporting an inference that the provision had an investigatory purpose, because if the aim was merely further to criminalize a failure to pay, the penalties of section 1 would already provide "some way of reaching" violators.

Moreover, when the idea of requiring weekly reporting was advanced in the hearings that led to the enactment of the provision, the witnesses making the suggestion were crystal clear that the payroll's themselves should be submitted in order to allow them to be "watch[ed] . . . constantly." 1 *Investigation of So-called "Rackets": Hearings Before a Subcomm. of the Senate Comm. on Commerce Pursuant to S. Res. 74*, 73d Cong., 2d Sess. 791 (1933); *accord id.* at 816 (to "follow up" on predetermination of wages). Furthermore, in response to one witness's mention of a case in which a contractor made his subcontractor "present his pay roll," Senator Copeland indicated that he thought it a "very practical suggestion that every *pay roll* should be certified and sworn to," clearly implying that the Senator expected that the payrolls themselves would be filed. *Id.* at 793 (emphasis added). Similarly, the 1935 report of the committee investigating the operation of the Davis-Bacon Act, on which Senator Copeland served, mentioned the then new regulations requiring submission of payrolls, which the report said were issued "[p]ursuant to the provisions of the Copeland Act" and which it said would "enable[] a thorough check of the pay rolls." S.REP. No. 332, *supra* p. 613, pt. 2, at 5.

There is no indication that the subsequent amendments of the Copeland Act were intended to alter this original intent. *See* Act of Aug. 28, 1958, Pub.L. No. 85-800, § 12, 72 Stat. 967 (replacing "sworn affidavit" with "statement"); Act of May 24, 1949, ch. 139, § 134, 63 Stat. 108 (deleting reference to section 1 of the act). In fact, when the law was amended in 1958 to require only a "state-

ment" instead of a "sworn affidavit," the Senate committee report stated that the act required the filing of "payroll information." S.REP. No. 2201, 85th Cong., 2d Sess. 2, 9 (1958); *see also id.* at 16, U.S.Code Cong. & Admin. News 1958 p. 4021 (reprinting National Advisory Committee for Aeronautics letter approving the change in "the filing of payroll information" so that only "a weekly statement of wages paid" would be required).

We think the Copeland Act clearly contemplated that the statement required to be submitted would provide some amount of wages paid to each employee each week. We do not say that the actual payrolls themselves, complete with their records of deductions and taxes withheld, must be required to be submitted. But we do think that the statement required by the act must contain at least individualized wage information for each covered employee.

III

We affirm the District Court as to the Secretary's elimination of the thirty-percent rule, the provision allowing use of helpers if that classification is "identifiable" in the area, and the provision allowing submission of a statement certifying compliance with wage laws. We reverse as to the provision excluding urban counties from certain rural wage determinations (and vice versa), the provision excluding prior Davis-Bacon Act projects from the wage calculations under the Act, and the expanded definition of a helper's duties.

It is so ordered.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-1631 (HHG)

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Plaintiffs,

v.

ELIZABETH H. DOLE, *et al.*,

Defendants.

MEMORANDUM AND ORDER

[Filed Sep. 24, 1990]

Before the Court is a motion to vacate an injunction blocking implementation of a regulation promulgated by the Department of Labor regarding the use of "helpers" on federally funded construction projects. This Court issued the injunction in 1982 after concluding that the regulation violated the Davis-Bacon Act. The Department of Labor has since promulgated a new regulation which, it is claimed by the government, does not conflict with the Act. Upon consideration of the motion, the opposition papers, and the entire record, the motion will be granted.

I

In 1982, Building and Construction Trades Department, AFL-CIO, and fifteen national and international labor unions affiliated with it, initiated the instant action to enjoin the implementation of new regulations promulgated by the Secretary of Labor, *inter alia*, to permit

businesses to expend the use of "helpers" on federal construction projects under the Davis-Bacon Act, 40 U.S.C. § 276a *et seq.* The acknowledged purpose of the changes was to reduce federal construction costs.

This Court concluded that the new regulations violated the Davis-Bacon Act and enjoined their implementation. *Building & Constr. Trades Dept., AFL-CIO* v. *Donovan*, 543 F. Supp. 1282 (D.D.C. 1982) (granting plaintiff's motion for a preliminary injunction); 553 F. Supp. 352 (D.D.C. 1982) (granting in relevant part plaintiff's motion for permanent injunction). The Court of Appeals affirmed in part and reversed in part. *Building & Constr. Trades Dept., AFL-CIO* v. *Donovan*, 712 F.2d 611 (D.C. Cir. 1983).

After the Court of Appeals decision, this Court modified its judgment by rescinding its injunctions as to certain regulations and leaving it in place as to others. 102 CCH Labor Cases ¶ 34,648 (Dec. 21, 1984). Specifically, the Court kept in place the injunction against several regulations governing the use of "helpers" on Davis-Bacon construction projects. At the same time, the Court stated that the Department of Labor could "submit to this Court reissued regulations governing the use of helpers, and if these regulations conform to the decision of the Court of Appeals, they will be approved." *Id.* at p. 46,702.

The Department of Labor has promulgated new regulations governing the use of "helpers", *see* 52 Fed. Reg. 31366 *et seq.* (August 19, 1987) (notice of proposed regulation), and 54 Fed. Reg. 4234 *et seq.* (January 27, 1989) (notice of final rulemaking), and it has moved to vacate the injunction.

II

The Department of Labor recognizes five classes of employees covered by the Davis-Bacon Act: skilled journeymen, unskilled laborers, semiskilled apprentices,

trainees, and helpers. The first four categories are well-defined and universally recognized. 712 F.2d at 622. In 1982, the Department amended the definition of "helpers" so as to include a semiskilled worker who works under the direction of, and assists journeymen. 29 C.F.R. § 5.2(n)(4). The Court of Appeals upheld the definition. 712 F.2d at 626-30.

In 1982, the Department also expanded the circumstances in which helpers may be used in Davis-Bacon projects. In the past, helpers could work on Davis-Bacon projects only if it was a prevalent practice to use them in local construction. The 1982 regulations permitted employment of helpers where their use was merely identifiable in an area. 47 Fed. Reg. 23644, 23658 (May 28, 1982). The Court of Appeals struck down this provision "because it operates to undermine the fundamental purpose of the Act: that wages on federal construction projects mirror those locally prevailing." 712 F.2d at 624; *see also*, 543 F. Supp. at 1285.

The revised regulation permits the use of helpers only where that classification prevails in the local area. Under the regulation, the use of helpers prevails:

> (1) if the prevailing journeyman wage is set by the "majority rule," *i.e.* more than 50 percent of the journeymen in a given local are paid the same rate, *see* 29 C.F.R. 1.2(a)(1), the practice followed by those contractors whose rates prevail for the journeyman is deemed the prevailing practice for determining whether a helper classification prevails.
>
> (2) If no prevailing journeyman wage exists, then the total number of workers in the classification employed by contractors using helpers (journeymen plus helpers) will be compared to the total number of workers in the classification employed by contractors not using helpers (journeymen only); the practice which covers the majority of workers determines whether a helper classification prevails.

52 Fed. Reg. at 4243 (January 27, 1989) to be codified at 29 C.F.R. § 1.7(d). The sole issue now before the Court is whether the reissued regulations conform to the statutory mandate.

III

The Act "delegates to the Secretary in the broadest terms imaginable, the authority to determine which wages are prevailing." 712 F.2d at 616. *See also*, 553 F. Supp. at 354. Accordingly, the Court reviews the Secretary's choice "only to ensure that he is acting consistently with the purpose of the statute and that his choice is not arbitrary." 712 F.2d at 618. Moreover, the Court of Appeals has endorsed a definition of the term "prevailing" in the instant case similar to the one as it was used here in a related context. *See* 712 F.2d at 616-17 (endorsing definition of "prevailing" relying first on majority rate and second on weighted average for determining prevailing wage).

Plaintiffs assert that the regulation is flawed in a number of interrelated respects: that the methodology chosen will indicate that the use of helpers prevails when it is merely identifiable; that the methodology does not take into account laborers and other classes of workers in its computations; that the regulation fails to require task-oriented practice surveys; and that the Department improperly concluded that helpers will not replace laborers to any large extent. The Court will address these in turn.

Underlying all these considerations, however, is the direction of the Court of Appeals that it is the premise from which the courts must start that the Secretary is in the best position to determine the methodology to be used. 712 F.2d at 616. Here, the Secretary has considered a number of alternatives, including several proposed by plaintiffs, and he has given reasoned explanations for the rejection of some and the selection of the one ultimately adopted. 54 Fed. Reg. 4236-40.

Plaintiffs' attacks on the methodology share a common flaw. They demonstrate nothing more than that there are several alternatives for determining whether the use of helpers is prevailing. Under the Court of Appeals mandate, it is not relevant that plaintiffs may believe, and may even have substantial support for the proposition, that one methodology is preferable to the others. The issue as it is now before this Court is not whether alternatives exist, since they obviously do, but rather whether the methodology chosen by the Department of Labor is irrational or contrary to the intent of the statute. Nothing proffered by plaintiffs demonstrates that this is the case.

The core of plaintiffs' attack on the agency's choice of methodology is that it will allow the use of helpers where they are merely identifiable as opposed to prevailing. However, this argument amounts to little more a disagreement with the Secretary about the meaning of the term "prevailing"—a matter largely within the Secretary's jurisdiction.

Plaintiffs believe, for example, that in order to be regarded as prevailing, the category of helpers must outnumber all other classifications of workers. However, under this approach the use of helpers would never be found to be prevailing since DOL regulations expressly provide that journeymen must outnumber helpers by a ratio of at least three to two. *See* 47 Fed. Reg. at 23,670, to be codified at 29 C.F.R. § 5.5(a)(4)(iv).

Plaintiffs next assert that the Act requires a comparison between helpers performing journeymen's work and journeymen performing the same work. The argument appears to be almost entirely based on language in the Court of Appeals decision to the effect that

> [W]here the Secretary has not found the use of helpers as provided for in the new rules to be a nearly universal practice, he is barred from allowing work that is "prevailing" categorized in one job

> classification to be placed in a lower paid classification merely because such a practice can be "identified" in the area.

712 F.2d at 625-26 (citations omitted). This language, however, merely states the obvious: helpers cannot be used on Davis-Bacon projects unless their use prevails in the community. Nothing in the decision mandates the use of the methodology proposed by plaintiffs. Indeed, it is doubtful that any court could require the use of a specific methodology in circumstances such as these.

Equally unavailing is plaintiffs' suggestion that the use of helpers cannot prevail unless the number of contractors in an area which use them exceeds those that do not. The Secretary considered this alternative and rejected it because did not give weight to the size of a contractor's work force. 54 Fed. Reg. 4239. The Court is constrained to hold that the language and the purpose of the statute do not compel a different result.[1]

IV

Plaintiffs argue that the methodology is flawed because it fails to take into account the number of laborers. However, that claim rests on the erroneous premise that the methodology does not, in fact, do so. A helper is a semiskilled worker who works under the direction of or assists a journeyman. The Department is of the view that if a worker meets that definition, he must be con-

[1] Plaintiffs argue in this regard that under the Department's methodology, the use of helpers will be found to prevail when, in fact, more journeymen work without their assistance than those that do. Absent the Court of Appeals direction, this Court would not necessarily be persuaded by the Department's contention that a helper classification should issue "[i]f the majority of workers, helpers, and journeymen combined, work on projects that use helpers . . . ." Defendants' Reply at 26. The normal usage of language would not countenance the conclusion that in this situation the use of helpers is prevailing. However, as the Court of Appeals made clear, the Department's methodology is to be accepted.

sidered a helper regardless of whether his employer or the union call him a laborer, tender, or any other title. That interpretation of the helper definition is entitled to deference, and plaintiffs' objection must therefore be rejected.

Plaintiffs contend to the contrary that the job title assigned by the union or employer should prevail. However, such an approach would amount to an invitation to the union and contractor to influence, or even to control, the outcome of the Department's determination simply by changing the workers' titles. The Court of Appeals appear to have implicitly rejected such a manipulable approach by endorsing a definition of helper irrespective of job title and tasks to be performed. 712 F.2d at 626-30.

Related to this point is plaintiffs' assertion that the prevailing practice can only be ascertained by task-oriented area practice surveys, which would determine the craft content of the work to be performed by "helpers". The argument amounts to an attempt to re-litigate an issue previously settled by the Court of Appeals. Prior to the codification of the new regulatory definition of helper, helpers were utilized only if their duties were separate and distinct from those of journeymen. Under the new definition, however, "lower paid but supervised helpers [may] undertake tasks that overlap with those of higher paid journeymen or laborers." 712 F.2d at 626. The Court of Appeals expressly rejected plaintiffs' claim that the statute required a task-oriented approach to the definition of helpers. *Id.* at 627-28. In approving the Department's definition, the court stated that:

> While some distinction between skilled and semi-skilled tasks would be retained, the essential functional distinction would be not the nature of the task done but rather the subordinate position of the helper vis-a-vis a journeyman.

Id. at 622-23. In view of this definition, which distinguishes helpers on the basis of a supervisory-subordinate distinction rather than on the basis of the duties performed, it is difficult to understand what a task-oriented survey would accomplish: as the Court of Appeals has determined, helpers may undertake tasks performed by both journeymen and laborers. *See* 712 F.2d at 626.[2]

Plaintiff Laborers' Union asserts that the Secretary erred in predicting that helpers generally will not substitute for laborers since laborers do not perform helper tasks and do not typically directly assist journeymen.[3] But the Secretary's assessment was based on the Department's experience and on a record that led the Court of Appeals to draw the conclusion that "in union areas of the country . . . helpers are little used." 712 F.2d at 630. Furthermore, the voluminous record submitted by plaintiffs demonstrates at most that helpers may replace laborers on occasion, and that some laborers directly assist journeymen and are semiskilled. But that record proves little about prevailing practices nationwide or about the likely effect of the helper regulation nationwide. In any event, the analytical statement that helpers will generally not substitute for laborers does not affect the implementation of the regulation or its rationale, and it therefore does not affect the validity of the rule. *See Thompson* v. *Clark*, 741 F.2d 401, 404-05 (D.C. Cir. 1984).

V

The Court must also reject plaintiffs' reliance on the Department's 1986 Davis-Bacon Wage Determinations

---

[2] This conclusion also disposes of plaintiffs' argument that the task of helpers may not overlap with those of laborers or of other non-supervisory classifications.

[3] The preamble to the regulation states that the Secretary has determined that "it is highly unlikely that helpers will substitute for laborers" because laborers "do not typically perform [helper] tasks . . . and do not typically directly assist [journeymen]." 54 Fed. Reg. at 4237.

Manual of Operations, for a number of reasons. First, the purpose of the wage surveys discussed in the Manual was to collect data about wages paid to mechanics and laborers, *id.* at 43, as opposed to ascertaining whether the use of helpers is prevailing. Second, the Manual neither incorporates nor reflects the new "helper" definition approved by the Court of Appeals. *See id.* at 21 (employing former definition). Third, the Manual predates the rulemaking at issue here and thus reveals little about the Department's current practices. Fourth, the Department is entitled to change its policies and practices as long as it gives a reasoned explanation for doing so. No one would dispute that the instant regulation, as well as those upheld by the Court of Appeals, represent a major shift in the Department's policies and practices. An out-of-date Manual of Operations clearly cannot prevent it from so doing.

VI

Plaintiffs also attack the Department's proposed conformance regulation under which new job classifications may be added to existing contracts.[4] *See* 54 Fed. Reg. at 4243, to be codified at 29 C.F.R. § 5.5(a)(1)(ii)(A). The regulation addresses the problem that arises when a job classification needed to complete a project has been left out of the contract. In such a situation, the contract may be "conformed" to include the required classification. If, for example, a project requiring a roofer does not provide for the hiring of a roofer, the regulation would permit the contract to be amended to include one.

Both the new and current regulation provide that work performed by a classification for which a conformance is requested cannot be performed by a classification already in the wage determination. However, in order to accommodate the helper regulation, which allows the use

[4] This Court enjoined the operation of the former version of the rule because it was part of the regulatory package of helper provisions. *See* 553 F. Supp. at 356.

of helpers whose duties overlap with those of journeymen and laborers, the new conformance regulation excepts helper classifications from this requirement. It also adds the requirement that the use of helpers must prevail before there can be a conformance.

Plaintiffs assert that the regulation would allow the contracting officer to determine, without guidance, whether the use of helpers prevails. The determination of whether the use of helpers prevails, however, would still be made under the test set forth in 29 C.F.R. § 1.7 (d), which addresses that very question.

Plaintiffs next object that the regulation would allow the addition of a helper classification via conformance when another classification performed the same duties under the supervision of a journeyman. Such a provision, however, was necessitated by the definition of helpers, which permits such overlapping duties. *See* 54 Fed. Reg. 4240.

Plaintiff suggests that contractors may attempt to use the conformance procedure to add lower-paid workers after the contract award. However, subsection (ii) (A) of the regulation specifically prohibits just such a gambit, providing that

> any class of laborer or mechanics including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination.

By the terms of this section, if a class of workers is already listed in a wage determination whose members meet the helper definition, an additional helper classification cannot be issued.

VII

The regulation provides that a contractor may not use more than two helpers for every three journeymen (or

forty percent of the total of journeymen and helpers). The rule is identical to the one promulgated in 1981 and which this Court enjoined in 1982. The Department invited comments on the regulation in 1981, and the final rule was adopted in 1982 after consideration of the comments received. 54 Fed. Reg. 4241.

Plaintiffs assert that the Administrative Procedure Act, 5 U.S.C. § 553 *et seq.*, requires a new round of notice and comment before the injunction can be lifted on the proposed regulation governing the numerical limit on the use of helpers in 29 C.F.R. § 5.5(a)(4)(iv), relying upon *Action on Smoking and Health* v. *Civil Aeronautics Board*, 713 F.2d 795, 799 (D.C. Cir. 1983). But in that case the Court of Appeals emphasized that the earlier ruling had "clearly and unequivocally *vacated* the offending portion" of the rule in question, 713 F.2d at 797 (emphasis in original), and new regulations could therefore not be issued without new rulemaking. *Id.* at 797-98. Here, however, the rules were not vacated.

The facts of the instant action are more closely akin to those in *American Federal of Government Employees* v. *OPM*, 821 F.2d 761 (D.C. Cir. 1987), where the Office of Personnel Management proposed rules for implementing reductions-in-force. The rules were held up by riders on appropriations bills preventing OPM from using funds to issue the rules. The riders expired in July 1985, and the agency immediately implemented a revised version of the rule over the unions' objections that renewed notice and comment was required. The Court of Appeals held that new notice and comment were unnecessary because the "invalidity [of the regulations] was merely temporary" and implementation of the regulations was "virtually automatic once the ban expired." 821 F.2d at 764. Similarly, in the instant case, the Court advised the Department of Labor that it could "submit to this Court reissued regulations governing the use of helpers and if these regulations conform to the decision of the court of

appeals, they will be approved." 102 CCH Labor Cases ¶ 34,648.[5]

The short of it is that plaintiffs have failed to show that the regulations are irrational or contrary to the language and purpose of the Davis-Bacon Act, and there is therefore no basis on which to continue the injunction in effect.

Accordingly, it is this 24th day of September, 1990

ORDERED that defendants' motion be and it is hereby granted; and it further

ORDERED that the injunction issued by this Court on December 23, 1982, as subsequently modified, be and it is hereby vacated.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

[5] Plaintiffs also argue without explanation that the two-to-three ratio will result in the breakdown of prevailing wage scales because it does not apply to the use of nonjourneymen other than helpers. The regulation, however, applies only to the use of helpers, and there simply is no basis for the Court to direct the Department to broaden its application.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 82-1631

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Plaintiffs,

v.

RAYMOND J. DONOVAN, *et al.*,

Defendants.

Dec. 23, 1982

Laurence Gold, AFL-CIO, Washington, D.C., for plaintiffs.

Surrell Brady, U.S. Dept. of Justice, Civ. Div., Washington, D.C., for defendants.

MEMORANDUM

HAROLD H. GREENE, District Judge.

On July 22, 1982, 543 F.Supp. 1282, the Court issued a preliminary injunction restraining the enforcement of certain regulations which the Secretary of Labor had issued ostensibly in implementation of the Davis-Bacon Act, 40 U.S.C. § 276a *et seq.*, and the Copeland Anti-Kickback Act, 40 U.S.C. § 276c. The same matter is now before

the Court on the parties'[1] cross motions for summary judgment.

The order granting the preliminary injunction was accompanied by a Memorandum which discusses the various regulations and the issues of this lawsuit at some length and, except for certain specific matters, no useful purpose would be served by plowing over the same ground once again in similar or greater detail.

Briefly, the July 22 Memorandum expressed the Court's view that the statutory language and the legislative history regarding the basis for the five types of regulations at issue was somewhat ambiguous, with language and history supporting the Secretary's interpretation more strongly with respect to some of the regulations and less strongly with respect to others. The Court ultimately resolved the doubts for preliminary injunction purposes in favor of the plaintiffs because each of the regulations issued by the present Secretary of Labor is wholly inconsistent with administrative interpretation contemporaneous with the enactment of the statutes about 1935 and consistent administrative practice since then. See generally *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 53 S.Ct. 350, 77 L.Ed. 796 (1933). The Court will now simply add the following to what was said on July 22, 1982.

First. Nothing substantially new has been adduced by the parties or the *amicus* or found by the Court with respect to three of the challenged regulations.

a. The Act directs the Secretary, in his ascertainment of the prevailing wage, to determine wages for "projects of a character similar to contract work." 40 U.S.C. § 267a. As the Court previously pointed out, administrative practice from the early 1930s on has been to consider both private and public projects in ascertaining the appropriate

[1] The Court permitted the Associated Builders and Contractors to file briefs as *amicus curiae* in support of the position of the Secretary of Labor.

standard for ascertaining the prevailing wage. The present Secretary's attempt to alter this consistent practice[2] is based essentially on nothing more than his policy difference with the preceding fifteen Secretaries of Labor. That is not enough. See Memorandum of July 22 at pp. 12-14.

b. The next point of dispute centers around the question whether, in setting prevailing wage rates for rural areas, the Secretary may consider the wages being paid in nearby metropolitan areas. As the Court previously indicated, the legislative history of this provision is mixed, but here, too, the ambiguities are fully resolved by contemporaneous and consistent administrative practice against the construction adopted by the present Secretary.

c. The Copeland Act requires the Secretary to issue regulations for federal contractors which, *inter alia*, require such contractors to "furnish weekly a statement with respect to the wages paid each employee during the preceding week." Secretaries of Labor have always construed this provision to mean that copies of the actual weekly payroll must be submitted. The regulations issued by the present Secretary, however, would require only a statement from the contractor that he had complied with the Act. The new regulation suffers not only from the same infirmity as the others referred to above—that it is contrary to consistent, long-standing administrative practice—but it is also subject to the additional criticism that it would render the Act largely unenforceable. See pp. 10-11 of the Memorandum of July 22, 1982.

Second. The Davis-Bacon Act provides that every federal construction contract shall contain a provision to the effect that the minimum wages being paid to various classes of laborers and mechanics shall be those determined by the Secretary "to be prevailing" for corresponding classes of laborers and mechanics. The existing regula-

---

[2] This consistent administrative practice was well known to the Congress, but it was never overruled by that body.

tions define "prevailing wage" as the wages being paid to at least thirty percent of those so employed. The new regulations issued by the present Secretary and temporarily enjoined by the Court would change this standard to provide in essence that a wage shall be deemed prevailing only if it is paid to a majority (more than fifty percent) of a particular class.

The Act itself does not provide a definition of "prevailing wage," and it is abundantly clear that the definitional task was entirely delegated to the Secretary. There is nothing intrinsically appropriate or inappropriate to the thirty percent rule or to any other figure as representing the "prevailing wage." Moreover, the legislative history of the statute and its purposes do not provide support for any particular figure. The statute quite simply relies on the Secretary to give content from time to time to the term "prevailing wage" in the exercise of his discretion and his expertise. There is no indication that Congress intended the first Secretary of Labor following enactment of the law to define the definition of prevailing wage for all time. To the contrary, contemporaneous and subsequent legislative materials indicate that Congress was fully aware that the definition might or would be adjusted depending on existing conditions. See 74 Cong.Rec. 6516 (Feb. 28, 1931); 75 Cong.Rec. 12365 (June 8, 1932); Hearings before Senate Committee on Labor and Human Resources on Military Construction Authorization Act of 1980, 96th Cong., 1st Sess. at 363 (1979).

In view of the background, which differs significantly from that of the other regulations at issue here, the Court concludes that, notwithstanding prior administrative practice, it was not improper for the Secretary to substitute the fifty percent standard for the earlier thirty percent standard. Accordingly, the Court will not enjoin that part of the new regulation which sets the prevailing wage

as the wage paid to the majority (more than 50 percent) of the various classes of laborers and mechanics.

Third. The post-argument briefs, including particularly that of the *amicus*, focus on the "helper" issue. In its Memorandum of July 22, 1982, the Court expressed the view that the various regulations which would permit a substantial increase in the number of "helpers" in the construction industry probably did not reflect the will of the Congress. The Associated Builders and Contractors argue with considerable vigor that the Secretary's revisions of the "helper" regulations are correct. In this regard, the *amicus* points to an alleged statutory mandate to establish classifications by regulation that would mirror actual practice; that the scope and significance of the helper category has expanded dramatically in recent years (particularly in non-union shops); and that the helper classification promotes employee opportunity. These arguments proceed from erroneous premises and they are insufficient to overcome the conclusions to be drawn from the basic legislative purpose.

The crux of the matter is this. The integrity of the statutory scheme requires that each "class of laborers and mechanics" be comprised of "members" who perform "well-defined tasks" and do not perform traditional craft work of another, higher paid class. This is a fundamental principle with which apparently neither the Secretary of Labor nor the *amicus* quarrel, at least not in theory. Indeed, the *amicus* argues that the Secretary's definition of "helper" will maintain "the strict lines of demarcation between skilled and unskilled labor." Memorandum at p. 15. But in practice that distinction can be maintained only if the tasks of the helper class are defined as discrete and distinguishable from those of laborers and mechanics.

Yet the new regulations would allow helpers to substitute for laborers and for journeymen, and that helpers would be allowed to perform tasks of all sorts. Under

these regulations, "helpers" would *not* be performing well-defined tasks either with regard to type of skill or to amount of experience, but they would be available in a general way to substitute for workers of many types and many levels of experience.[3]

The *amicus* suggests that any problems in this regard are remedied by the provision in the regulation which forbids contractors to pay reduced rates for work "properly performed" by classes other than helpers (Memorandum, p. 17). However, since the entity which will determine whether a particular task is "properly performed" by a helper or by a skilled person will be the contractor, it may reasonably be assumed that his determination will follow his self-interest: lower-paid helpers will be regarded as properly performing many tasks traditionally beyond their competence. When Congress enacted the Davis-Bacon Act, it was well aware of these practicalities (see, *e.g.*, Cong.Rec. Senate, p. 12073 (July 30, 1935)) and it sought to guard against them. It is quite clear that the new regulation would subvert the congressional will.[4]

Despite its seeming complexity, the basic issue governing this lawsuit is relatively simple. Congress enacted the Davis-Bacon Act and the Copeland Act in the 1930s with certain purposes in mind. Regulations were issued very

---

[3] The legislative history indicates that when "actual practice" may be equated with a practice to evade the prevailing wage requirement it is not determinative. Cong.Rec. Senate, p. 12073, July 30, 1935.

[4] As for the argument of the *amicus* that increased use of the helper classification promotes employee opportunity, it appears that as of 1978 minority participation in joint union-management apprenticeship programs was 21.2 percent while its participation in open-shop trading programs was only 11.4 percent. Department of Labor data tabulated for Union and Open Shop Construction, p. 72 (1978). The regulation adopted by the present Secretary is likely to have the effect of allowing contractors to replace higher wage minority laborers with lower wage minority helpers.

shortly following the enactments to implement the words and purposes of the legislature. In spite of substantial public debate concerning both the laws and the regulations in the years since then, the Congress has not amended the law and it has not expressed its displeasure with the regulations. Moreover, fifteen Secretaries of Labor serving under eight Presidents have never altered the regulatory scheme. The present Secretary's claim to have discovered a wholly different congressional intent rings hollow in the light of that history.

For the reasons stated, the Court this day permanently enjoins the enforcement of all the new regulations at issue here, with the sole exception of the regulation which defines the prevailing wage in terms of a higher percentage of employees in each class of laborers and mechanics than was provided for heretofore.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 82-1631

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Plaintiffs,

v.

RAYMOND J. DONOVAN, *et al.*,

Defendants.

July 22, 1982

Laurence Gold, AFL-CIO, Washington, D. C., for plaintiffs.

Surrell Brady, U.S. Dept. of Justice, Civ. Div., Washington, D. C., for defendants.

MEMORANDUM ORDER

HAROLD H. GREENE, District Judge.

This is a motion for a preliminary injunction[1] which seeks to restrain the enforcement of certain regulations

---

[1] Plaintiffs are the Building and Construction Trades Department, AFL-CIO; the American Federation of Labor and Congress of Industrial Organizations, and several other labor unions. Raymond J. Donovan, Secretary of Labor; and Robert B. Collyer, Deputy Secretary of Labor for Employment Standards; and William M. Otter, Administrator of the Wage and Hour Division, are defendants herein.

issued in implementation of the Davis-Bacon Act, 40 U.S.C. § 276a *et seq.*, and the Copeland Anti-Kickback Act, 40 U.S.C. § 276c. The regulations are to take effect on July 27, 1982.[2]

I

The Davis-Bacon Act was enacted in 1931 and substantially amended to achieve its present format in 1935. Its principal purpose is to protect employees on federal projects by guaranteeing to them a minimum wage based on local prevailing wage rates. The Copeland Anti-Kickback Act was enacted in 1934, its purpose being to deter kickback practices by contractors on public construction projects. The issues here revolve around regulations issued after appropriate rule-making[3] by the Secretary of Labor in May 1982 which depart significantly in five respects from the regulations or interpretations which have been in effect since the early 1930s. The plaintiffs challenge the legality of the regulations in all of these respects.

On this motion for preliminary injunction the Court must consider whether plaintiffs have demonstrated (1) a strong showing that they are likely to prevail on the merits of their claims; (2) that without an injunction they will be irreparably injured; (3) that issuance of the injunction will not substantially harm other parties interested in the proceedings; and (4) that the public interest favors the grant of an injunction. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir.1977).

---

[2] The action was filed on June 11, 1982. On July 9, 1982, plaintiffs sought a temporary restraining order, but that application was not pressed in view of the Court's commitment to hear the preliminary injunction motion and cross motions for summary judgment prior to July 27, 1982. Briefs were filed on July 15 and 19, and a hearing was held on July 20. Because of the short deadline, the Court is deciding today only the preliminary injunction issues; the summary judgment motions are under advisement.

[3] There are no claims of procedural irregularity.

II

In the view of the Court, plaintiffs have demonstrated a substantial likelihood that they will prevail on the merits. That conclusion is based in part on the Court's review of the language of the statute and its legislative history (which are discussed in this part of the opinion) and on the long and consistent administrative practice prior to the issuance of the new regulations (Part III, *infra*).

1. The Davis-Bacon Act establishes that the Secretary shall issue wage determinations based on the "wages . . . prevailing for the corresponding classes of laborers and mechanics" in the area. The parties are in disagreement on the question whether this language permits the Secretary to issue regulations which would permit a substantial increase in the issuance of wage rates for semi-skilled "helpers." The new regulation provides for such an increase (1) by defining "helpers" as a class of "mechanics or laborers"; (2) by eliminating the requirement that the helper classification be prevailing in an area as long as it is "identifiable"; (3) by allowing the use of helpers for forty percent of the total number of workers in a particular classification and by permitting even that limit to be exceeded under circumstances; and (4) by adding helper classifications to a wage determination even though they were not included at the time the contract was awarded. In the opinion of the Court, these changes are not consistent with the statute.

At the time of enactment of the Davis-Bacon Act, Congress was acutely conscious of efforts by some employers to classify workers as "helpers" in order to avoid paying the skilled laborers' wage.[4] The Senate Committee report noted that wage standards had

---

[4] See, *e.g.*, 1932 House Hearings at 109-10; 1934 Hearings before a subcommittee of the Senate Committee on Education and Labor, pursuant to S.Res. 228, 73rd Cong., 2d Sess. (1934), pp. 414, 428, 559, 530-31.

> largely broken down by intermediate classifications of labor and failure to retain the strict lines of demarcation intended to be drawn and maintained between skilled and unskilled labor. The whole tendency has been for wages of the skilled group to descend toward the level of the unskilled group, this by reason of intermediate classification devices.

The report concluded by recommending that construction contracts contain a provision stating that the minimum wages to be paid "various classes of laborers and mechanics" shall be based on wages prevailing "for the corresponding classes of laborers and mechanics," the language ultimately adopted in 1935. See S.Rep.No.332, 74th Cong., 1st Sess. (1935), Part 3, at pp. 13, 15-17.

The new regulations will permit precisely that which Congress intended to halt in 1935. The concept of "classes of laborers or mechanics" was and is central to the statutory scheme. Under existing and long-established industry and administrative practice, a "class" of workers is one that has been historically recognized as such and whose members perform well-defined tasks. Helpers have therefore been recognized as a class only when their use has been prevailing in an area and they have formed a distinguishable group performing discrete tasks.

Under the new regulations, helpers not only are not defined in traditional terms, but they may perform any task throughout the entire construction field: they are "general helpers." As a consequence, such individuals would be allowed, at the discretion of the contractors, to perform the tasks of laborers of journeyman mechanics, and of laborers and mechanics on a cross-craft, multi-trade basis. Obviously, if contractors could thus assign a helper to perform the tasks of any and all classes of laborers and mechanics and they could do so at lesser pay, they will do just that, and the requirement that wages be based on "corresponding classes" will effectively be read

out of the law.[5] As the Wage Appeals Board said in *Fry Brothers Corp.*, 123 WAB No. 76-6 (June 14, 1977), at pp. 15-16:

> If a construction contractor who is not bound by the classifications of work at which the majority of employees in the area are working is free to classify or reclassify, grade or subgrade traditional craft work as he wishes, such a contractor can, with respect to wage rates, take almost any job away from the group of contractors and the employees who work for them who have established the locality wage standard. There will be little left to the Davis-Bacon Act.

Moreover, under existing administrative practice, a helper classification is recognized only if it is "prevailing" in a particular area; under the new regulations, the use of helpers need only be "identifiable" to be recognized. Yet the statute itself refers to "wages . . . prevailing for . . . classes," not to wages identified for classes.[6] The effect of this change will be that when there is a single "helper" or a small group of helpers in a town or a metropolitan area, helpers may be employed in substitution of traditional craft workers throughout that area in all aspects of construction work. In that respect, again, the new regulations will depart both from prior practice and from the central purpose of the Act.

---

[5] Former Secretary of Labor John T. Dunlop states in an affidavit submitted to the Court that

> there is no practice of 'jack-of-all-trades' helpers much less multi-craft helpers. Injecting these foreign classifications under these circumstances and providing contractors use them a competitive advantage reflects not recognition of industry's practice or local practice, but has the consequence of undermining prevailing recognized local practices and wage rates.

[6] If there is no prevailing practice in the locality to employ helpers, they may not be used for Davis-Bacon Act purposes.

For these reasons, it is unlikely that, when the merits are reached, this regulation can be allowed to stand.[7]

2. The 1935 amendments to the Act direct the Secretary, in his ascertainment of the prevailing wage, to determine wages for "projects of a character similar to contract work." 40 U.S.C. § 276a(a). The present regulation, which became effective contemporaneously with the 1935 statutory enactment, permits the Secretary, in performing this function, to include the wages paid in federal construction projects. The regulation issued two months ago explicitly mandates to the contrary that in compiling wage rate data the Secretary "will not use data from Federal or federally assisted projects" unless wage data from the private sector are insufficient for the Secretary's purpose.[8] In the opinion of the Court, the existing regulation far more faithfully reflects the intent of Congress than that which has just been issued.

In the first place, the statute expressly mandates the Secretary to consider "projects of a character similar"; not "*private* projects of a character similar." If a limitation or qualification is to be read into the statute it would have to be on the basis of extrinsic aids to construction, such as legislative history or administrative practice. But these aids support the plain meaning of the statute; they do not contradict it.

---

[7] The Secretary defends the regulation in part on the ground that it will facilitate non-formal training of women, minorities, and young workers. Memorandum, p. 38. In fact, it will assign members of such groups to the lowest classification of workers, and it is likely to keep them there on a permanent or long-term basis. Much of the Secretary's other explanations for the new regulation revolve around cost savings, but there are also references to his belief that the use of helpers will increase efficiency and productivity and to the fact that helpers are widely used in private industry. None of these reasons satisfactorily explains the departure from prior practice. See Part III *infra*.

[8] Certain types of projects are also exempt.

The congressional committee reports published at the time of the original enactment of the Davis-Bacon Act in 1931 indicated that only "wages established by private industry" could be regarded as constituting the appropriate standard for the ascertainment of the prevailing wage. However, a serious problem arose with this standard when, during the Depression, very little private construction was going on. Accordingly, notwithstanding the congressional mandate, both Secretary Doak and Secretary Perkins considered also data from publicly-financed projects in determining wage rates for Davis-Bacon Act purposes, and this administrative practice was duly drawn to the attention of the Congress when it considered amendments in 1934.

The amendments were enacted in 1935, and the language "work of a similar nature" was changed to "project of character similar to the contract work"—a change which directed an alteration of the focus from similarity of tasks to similarity of projects. Further, notwithstanding the departmental practice after 1931, neither the committee reports nor the legislative debates this time contained any language which could be read as restricting the universe of projects to those of a private nature.

It appears to the Court that this history does not support the conclusion that, contrary to the language of the statute, Congress intended to limit, and did limit, the Secretary to private construction in making his wage determination. It follows that this aspect of the regulation is unauthorized by law.[9]

---

[9] The Secretary seeks to justify his change in the regulations on the basis of the argument that the inclusion of data from government construction projects improperly raises the level of the prevailing wage. However, as the Supreme Court has pointed out, "the Davis-Bacon Act 'was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects.'" *Walsh v. Schlecht*, 429 U.S. 401, 411, 97 S.Ct. 679, 686, 50 L.Ed.2d 641 (1977).

3. The next point of dispute between the parties concerns the wage rates to be used where there has been no significant construction on the basis of which a prevailing wage rate could be established, especially with respect to rural areas. The Davis-Bacon Act provides that the geographic reference point for prevailing wage determinations is the "city, town, village, or other civil subdivision of the state in which the work is to be performed. . . ." 40 U.S.C. § 276a(a). Long-standing regulations provide that

> If there has been no similar construction within that area in the past year, wage rates paid on the nearest similar construction may be considered.[10]

The regulation just issued contains similar language but adds a proviso to the effect that

> . . . projects in metropolitan counties may not be used as a source of data for wage determination for a rural county.

The legislative history of the Act shows that the drafters concluded that, as Congressman Connery, chairman of the House Committee on Labor in 1931, put it when asked about the establishment of prevailing wage rates with respect to small towns, "[t]he only practical way the Committee found was that if you had a small town between two large cities they would take the prevailing wage scale of those two cities." 75 Cong.Rec. 12376-77. See also, the debate reported in 75 Cong.Rec. 12365-66.[11]

---

[10] Another regulation (sec. 7 of regulation 503) refers to use of data from the "nearest large city" when there has been no construction of a similar character in recent years. These regulations appear to have been consistently interpreted as permitting the use of wage data from nearby metropolitan centers for the establishment of the prevailing wage for a rural area.

[11] And see, 25 U.S.C. § 450e; 33 U.S.C. § 1372; and 12 U.S.C. § 1749a(f) where the Congress, unlike here, limited wage applications to "similar construction in the *immediate* locality" (emphasis added).

The Secretary correctly points, on the other hand, that concern had been expressed in Congress about the indiscriminate importation of metropolitan wages to upset rural wage scales. *Legislative History of the Act Amending the Prevailing Wage Section of the Davis-Bacon Act*, House Committee on Education and Labor, 88th Cong., 2d Sess. at 24 (1964); see also, Senate Report No. 332, 74th Cong., 1st Sess. pp. 10, 13 (1935).[12]

It is fair to say that the legislative history is mixed, and the Court concludes that without the consideration of the factor of administrative practice (see Part III *infra*), the proper meaning of the statute on this aspect of the case would not be free from doubt.

4. Section 1 of the Davis-Bacon Act provides that every covered federal construction contract shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics that "will be determined by the Secretary of Labor to be prevailing" for corresponding classes of laborers and mechanics. Existing regulations provide that [13]

> in the event that there is not a majority paid at the same rate, then the [prevailing wage rate in the area shall be that] paid to the greater number: Provided, such greater number constitutes 30 percent of those employed.

The new regulation [14] specifies that the prevailing wage shall be

---

[12] However, the Secretary's reference (Memorandum, p. 23) to a statement by Congressman Bacon, in which he warned against the importation of "cheap bootleg labor" into a community, is ill-advised, for it does not demonstrate that Congress, which was basically interested in protecting workers against substandard wages, objected to the use of metropolitan wages in nearby small towns.

[13] See 29 C.F.R. § 1.2(a).

[14] 47 Fed.Reg. 23,652 (1982).

> the wage paid to the majority (more than 50%) [or] if the same wage is not paid to a majority . . . the 'prevailing wage' shall be the average of the wages paid, weighted by the total employed in the classification.

The Secretary's position with respect to this provision, too, is not without support.

It has consistently been held that the Act itself does not establish any definition of "prevailing wage," this being the Secretary's responsibility.[15] This principle would seem to be sufficient to allow the Secretary to select a standard other than the thirty percent rule, provided it is a reasonable one.

Plaintiffs rely to the contrary primarily upon a dictionary definition of "prevailing" as meaning more frequent, as distinguished from being a synonym for "majority." Even if one were to consider this to be the true test of the meaning of the statute, it does not exclude the possibility that the Secretary, in the exercise of his discretion and on the basis of his expertise, may choose a fifty percent standard as being prevailing.

Thus, it would appear that if this issue came up on a blank slate, the new regulation would be upheld. However, the fact is that the Secretary has given no reasoned explanation for the new regulation,[16] which departs from a rule adopted by the Department of Labor on the very day the 1935 Act became effective. Thus, for the reasons discussed below, it is likely that on this basis the plain-

---

[15] However, as noted in note 27 *infra*, the Secretary is given broad, basically unreviewable discretion primarily with respect to individual wage determinations, not with regard to rule-making decisions.

[16] The Secretary's reasons for adopting a new regulation—primarily that the thirty percent rule gives undue weight to collective bargaining and that it is inflationary—are not in the least persuasive, for they bear no relationship to the purposes of the statute.

tiffs will be able to prevail on this aspect of the case when the Court reaches the merits.

5. The Copeland Act requires the Secretary to issue regulations for federal contractors, including regulations requiring them to "furnish weekly a statement with respect to the wages paid each employee during the preceding week." 40 U.S.C. § 276c. The question in dispute between the parties is whether the statute requires the actual submission of the contractors' weekly payroll—as the current regulation does [17]—or whether it sanctions the new regulation which requires only the submission of a statement of compliance in which the contractor certifies that he has paid the required wages to all of his employees.[18]

The Secretary rests essentially on the proposition that the statute makes no mention of payrolls or payroll records, and on the statement of Senator Copeland, sponsor of the law, to the effect that only affidavits "about" the payroll are required. Memorandum, p. 32. But these arguments fail to address the central fact that the statute requires contractors to submit to the Secretary each week information as the wages paid to "each employee" during the preceeding week. A general affidavit covering the wages paid to all the employees during the preceeding week obviously does not comply with that mandate.[19]

---

[17] Sections 5.5(a)(3), 3.3(b), and 3.4.

[18] 47 Fed.Reg. 23668, to be codified at 29 C.F.R. § 55(a). The regulation also provides that the contractor shall submit the payroll records upon request of the Secretary.

[19] The legislative history likewise supports the payroll submission requirement. See Senate Report 332, 74th Cong., 1st Sess. 5-6 (1935); Hearings Before the Subcommittee of the Committee on Commerce Pursuant to S.Rep. 74, 73rd Cong., 2d Sess. (1933) pp. 791-97, 816-17; 1934 Hearings of Senate Committee on Education and Labor, pp. 192-93. Indeed, an effort in 1979 to eliminate the requirement of payroll submission failed of enactment.

Moreover, it appears, contrary to the Secretary's position, that actual payroll information is essential to the achievement of the Act's purposes.[20] Unless precise records are submitted to the Department on a weekly basis, they will in many instances never become available, inasmuch as—largely because of the transient nature of much construction business [21]—many contractors and subcontractors maintain neither offices nor permanent records. Indeed, even if those conditions were absent, generalized statements that there has been compliance would not give enforcement personnel even the beginnings of a basis for further investigation. In short, it appears that enforcement of the Act would be in serious jeopardy if the new regulations were to be substituted for the present practice.[22]

For these reasons, the Court concludes that, on the basis of the statutory language and its purpose alone, plaintiffs have demonstrated a strong likelihood of success with respect to the Copeland Act regulations.

III

As seen in the necessarily brief survey *supra*, it is clear, at a minimum, that the language and history of the two laws lend at least as much support to plaintiffs' position

---

[20] Both the Department of Labor and other departments have publicly so stated in the recent past. See Hearings before the Senate Committee on Labor and Human Resources, S. 1319, 96th Cong., 1st Sess., pp. 277-79 (July 17-19, 1979); Hearing on S. 3061, before the Subcommittee on Federal Spending Practices and Open Government of the Senate Committee on Government Affairs, 96th Cong., 1st Sess., p. 147 (1979).

[21] Often, workers are hired on a daily basis and they are paid in cash.

[22] Present practice does not require contractors to generate records solely for purposes of the Copeland Act. A contractor will be in full compliance simply by providing duplicates of their payroll records which he must maintain in any event to comply with the Fair Labor Standards Act. See 29 C.F.R. § 5.16.

as to the Secretary's, and that with respect to several of the provisions only the construction advanced by the former is consistent with the statute. With the case in that posture, the Court may look appropriately for guidance to administrative interpretation and practice. That interpretation and that practice reveal the following,

Administrative construction that was contemporaneous with the adoption of the Davis-Bacon Act conclusively supports the views espoused here by the plaintiffs in every significant respect.[23] Those who knew best what Congress intended—the administrators who issued interpretative regulations within a short period after the enactment of the statute, sometimes within days—fully support by their actions the arguments made by the plaintiffs regarding congressional intent and the inferences they ask the Court to draw with respect to the meaning of these laws. On that basis alone, it would be difficult to escape the conclusion that the statutes should be so interpreted. See, *e.g.*, *FTC v. Mandel Bros.*, 359 U.S 385, 391, 79 S.Ct. 818, 823, 3 L.Ed.2d 893 (1959).

That is not all. For forty-seven years thereafter, through the administrations of eight Presidents[24] and fifteen Secretaries of Labor[25] of many political and ideological persuasions, those interpretations and those regulations stood without substantive alteration. During that period none of the administrators effected the kinds of fundamental changes that are brought about by the regulations adopted two months ago; instead, the various Secretaries of Labor continued to interpret and enforce the laws precisely in accordance with the original under-

---

[23] The Secretary has made no substantial effort to contest that conclusion.

[24] Presidents Roosevelt, Truman, Eisenhower, Kennedy, Johnson, Nixon, Ford, and Carter.

[25] Secretaries Doak, Perkins, Schwellenbach, Moses, Tobin, Durkin, Mitchell, Goldberg, Wirtz, Shultz, Hodgson, Brennan, Dunlop, Usery, and Marshall.

standing. Nor can this stability and consistency in construction by those charged with the laws' enforcement be attributed to inattention, oversight, or neglect (as is sometimes true when relatively obscure laws or regulations are involved). The Davis-Bacon Act is and always has been a well-known law, affecting millions of employers and wage-earners throughout the United States, and it has frequently been the subject of political and other controversy.

Such consistent, unwavering administrative construction must be accorded very substantial weight by the Court. See, *e.g.*, *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 53 S.Ct. 350, 77 LEd. 796 (1933); *United States v. Leslie Salt Co.*, 350 U.S. 383, 396, 76 S.Ct. 416, 423, 100 L.Ed. 441 (1956); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 673 n. 12, 100 S.Ct. 1932, 1941 n. 12, 64 L.Ed.2d 593 (1980). Justice Cardozo's statement in *Norwegian Nitrogen* is particularly apt:

> . . . administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful . . . . The practice has peculiar weight when it involves a contemporaneous construction by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.

288 U.S. at 315, 53 S.Ct. at 358.

The Secretary's reply is that an agency is not bound to adhere to prior erroneous practice for all time but may make adjustments and changes in the light of its expertise and experience. That principle is unexceptionable in the abstract, but it is also more directly applicable to the exercise of broad public interest-type discretion than it is to actions which are essentially exercises

in statutory construction.[26] Moreover, the Secretary's principle does not seem to have been successfully pleaded in the past to defeat interpretations and administrative practices as open and consistent as those revealed by this record.[27] See *Baltimore & Annapolis R. Co. v. WMATA*, 642 F.2d 1365 (D.C.Cir.1980), where the court referred to the fact that the agency attempted to overturn the position taken in "an order issued only a few years after an enactment of the [statute] and allowed to stand without challenge or contradiction for more than twelve years." Under these circumstances, said the court, it would not be justified in merely deferring to the agency's conclusion but would make an independent judgment, examining the agency's conclusions with "more exacting vigilance" than would otherwise be employed. 642 F.2d at 1371.

---

[26] For that reason, the decisions on which the Secretary relies are not apposite here. In *New Castle v. CAB*, 371 F.2d 733 (D.C. Cir. 1966), the court was dealing with a statute which left to the agency broad authority to regulate in the public interest. Under such circumstances, indicated the court, the agency is not precluded from effecting changes in furtherance of a new philosophy. *Office of Communications of United Church of Christ v. F.C.C.*, 590 F.2d 1062 (D.C. Cir. 1978), which is the other case cited, is to the same effect, the court using such language as "open-ended provisions" and "discretion to strike a balance." 590 F.2d at 1068. Here the Secretary does not claim to be acting on the basis of a new philosophy; he asserts that he is merely implementing the congressional purpose on the basis of improved experience and expertise.

[27] Likewise inapplicable is the line of cases cited by the Secretary which exempts wage determinations made by the Department of Labor from judicial review. See, *e.g.*, *United States v. Binghamton Construction Co., Inc.*, 347 U.S. 171, 74 S.Ct. 438, 98 L.Ed. 594 (1954); *Universities Research Association, Inc. v. Coutou*, *supra*, 450 U.S. 754, 101 S.Ct. 1451, 67 L.Ed.2d 662 (1981). These decisions all concern specific, individual wage determinations, not broad regulatory changes. Indeed, a number of decisions hold that general rules are *not* immune from judicial scrutiny. See *Commonwealth of Virginia v. Marshall*, 599 F.2d 588, 592 (4th Cir. 1980); *North Georgia Bldg. & Const. Trades v. Goldschmidt*, 621 F.2d 697 (5th Cir. 1980).

In any event, when an agency abruptly changes a long-standing administrative position, regardless of the context, it may be expected at a minimum to show that the earlier understanding of the statute was wrong or that experience has proved it to be defective.[28] As indicated *supra*, the Secretary has done neither; his primary reliance throughout has been on cost and cost savings—matters neither of novel experience nor of special expertise, but well known to and considered by the Congress as early as 1931.

The basic purpose of the Davis-Bacon Act is to protect the wages of construction workers even if the effect is to increase the costs of construction to the federal government. In 1931 and 1935—notwithstanding such opposition as that of President Hoover who cited a "great increase in expense to the taxpayer" as one of his principal grounds [29]—the wage-floor philosophy prevailed over that which regarded low cost to the government as the prime consideration. The Congress enacted the statute which embodied that philosophy; it later further strengthened that law; and it never repealed, modified, or weakened it in any way.

It is not for the Court to judge whether the basic policy decision to prefer wage floors over expense to the government was or is wise. More to the point, it is not for the Secretary of Labor or his subordinates to make that judgment. Under our constitutional system, policy decisions are not made by government administrators; they are made by the Congress. In this instance Congress made its decision, first in 1935 by the enactment of the Davis-Bacon Act, and then again in the forty-seven years since that time by the failure and refusal of succeeding

---

[28] See *Greater Boston Television Corporation v. F.C.C.*, 444 F.2d 841 (D.C. Cir. 1970); *Columbia Broadcasting System, Inc. v. F.C.C.*, 454 F.2d 1018, 1026 (D.C. Cir. 1971).

[29] *The Legislative History of the Davis-Bacon Act*, House Committee on Education and Labor, September 1962, p. 13.

Congresses either to change the law or to suggest that in all these years it had been improperly interpreted and applied.

For these reasons, the Court finds that plaintiffs have shown a strong likelihood of success on the merits.[30]

IV

The balance of interests and injuries likewise weighs heavily in favor of plaintiffs.

Some 600,000 contracts subject to the Davis-Bacon Act or related statutes appear to be in force at any one time, and approximately $43 billion is spent annually for construction work covered by these statutes. These construction projects are governed by complicated sets of procedures, including proposals, evaluations, reviews, bids, and contracts clauses, with labor standards requirements interwoven throughout.[31] It is obvious that substantial confusion would result if contracts were bid under the new regulations and these regulations were at some future date declared to be invalid. This would harm not only the employees whose wages would be reduced in the interim but also the employers who would be confronted with an almost impenetrable maze of changes and recomputations. The public would likewise be injured, for it would hardly benefit from the disruption of the contracting process that would inevitably follow from

---

[30] This does not mean that the Court has concluded that every one of the provisions at issue in this lawsuit will ultimately be found to be unauthorized by the statute and hence invalid. Notwithstanding the general infirmity stemming from the Secretary's departure from contemporaneous and consistent administrative interpretation, it may be that, on the merits, it will be found that the Secretary has sufficient latitude under the statute with respect to one or more of the regulatory provisions to adopt his current construction.

[31] Plaintiffs have suggested that some fifty-eight substantive laws enacted by the Congress include Davis-Bacon Act standards.

a change in the status quo before the legality of the regulations had been determined with finality.

There is no comparably urgent need for allowing the regulations to become effective immediately. All concerned have lived under the old regulations and interpretations for well over forty years. Two and one-half years have passed since the effort to change the regulations was begun. An additional period of delay while the legality of the regulations is judicially determined with finality cannot significantly harm either the government or others.[32] The Secretary relies on an affidavit from the Administrator of the Wage and Hour Division in support of his claim of immediate and irreparable harm. But this affidavit in the main demonstrates only that internal administrative *preparations* have been made for implementation of the new regulations[33]—not that anything has been done that cannot easily be undone or that cannot be used at a later date in the event the regulations are subsequently declared to be valid.

The Secretary points to the cost to the government from a delay in enforcement, the obvious premise being that construction can be achieved more cheaply under the new regulations than under the old. In response it may be observed, once again, that this is a cost that is inherent in the policy decision Congress made in 1935 and maintained for the past forty-seven years. Beyond that, costs of the government are not the only ones to be considered on a balance of the injuries and the equities.

---

[32] For that reason, this case is unlike *Metzenbaum v. Edwards*, 510 F. Supp. 609 (D.D.C. 1981), where this Court refused to issue a preliminary injunction against enforcement of President Reagan's oil decontrol order. That injunction was sought several weeks after decontrol had already occurred and the industry had adjusted to its terms.

[33] The affidavit is studded with phrases indicating that instructions, analyses, or memoranda "are being prepared [or] revised [or] conducted . . . ."

Several categories of persons will suffer significant injury if the new regulation is improvidently permitted to take effect notwithstanding its apparent invalidity as follows. First, those now employed under construction contracts governed by the current regulations will, under the new regulations, be forced to accept lower wages—a change for which they will have no legal avenue of redress. Second, either journeymen craft employees are likely to be replaced by helpers or they will be forced to work at helper wages if they wish to work at all. Third, union contractors who are parties to collective bargaining agreements will be squeezed out of the procurement process by contractors who are able to make lower bids under the new regulations. None of these injuries is likely to be remediable in the event that it is ultimately decided on the merits that the regulations are invalid.

The Court concludes that, upon a balancing of the harm to the plaintiffs, the defendants, and the public, from either a denial or a grant of an injunction, and taking into account the likelihood that plaintiffs will succeed on the merits, it is appropriate that a preliminary injunction issue.

V

For the reasons stated, it is this 22nd day of July, 1982,

ORDERED That defendant Secretary of Labor Ray Donovan and all officers, agents, and employees under his direction and control be and they are hereby enjoined and restrained from administering, enforcing, or giving any force and effect to the regulations published in the Federal Register on May 28, 1982, implementing the Davis-Bacon Act and its related statutes (47 Fed. Reg. 23644-23676) to be codified as 29 C.F.R. §§ 1.2(a), 1.3, 1.7(b) and (d); 29 C.F.R. §§ 5.2(n)(4), 5.5(a)(1)(ii)(A) and (B), 5.5(a)(3)(ii) and and (III), and 5.5(a)(4)(iv); and 29 C.F.R. 3.3(b), pending final disposition of this action.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-1631 (HHG)

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Plaintiffs,

v.

ELIZABETH H. DOLE, *et al.*,

Defendants.

MEMORANDUM AND ORDER

[Filed Jan. 30, 1991]

Before the Court are plaintiff's motion for an injunction pending appeal in this case and their request for a hearing on the motion. In September, 1990 this Court ruled that newly proposed Department of Labor regulations on the use of helpers at government construction sites were valid. The Court vacated its 1982 injunction against the enforcement of the government's earlier regulations. The plaintiff's appeal of this order is now pending in the Court of Appeals. The Department of Labor has indicated that its new regulations will take effect on February 4, 1991. Plaintiffs ask this court to enjoin enforcement of the new regulations until the Court of Appeals has ruled on the validity of the new regulations.

This kind of interim relief is appropriate where all of the following conditions are met: (1) a serious legal question is presented; (2) denial of the injunction would inflict irreparable injury on the plaintiff; and (3) little

if any harm will befall other interested persons or the public. *Washington Metro. Area Transit Com. v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).

Here the plaintiffs argue that at least four serious questions are presented: whether the final regulations require an additional comment period before going into effect; whether this Court's deference to the agency decision was inappropriate under *Boston v. Georgetown University Hospital*, 488 U.S. 204, 212-13 (1988); whether the conformance regulations and the 40% limit on helpers are inadequate under the Davis-Bacon Act; and whether this Court misapplied the standards set out by the Court of Appeals.

The defendants argue that the plaintiffs cannot show a substantial likelihood of succeeding on these issues because this Court already considered carefully and rejected their arguments. But to meet the first prong of *Washington Metro. Area Transit Com.* test this Court need not find that the Court of Appeals will likely reverse this Court's original decision. Rather, it need only find that the issues presented are serious legal questions. The plaintiffs have met this standard.

Next, the Court must determine whether "the equities of the case suggest that" an interim injunction is appropriate, considering the possible harm to the plaintiffs and other parties affected. *Id.*, 559 F.2d at 844. When the regulations go into effect, some laborers and mechanics may be reclassified as helpers and may be forced to accept lower wages, and other laborers and mechanics will be denied employment opportunities that will instead be given to helpers. If, on appeal, the new regulations are determined to be invalid, those laborers and mechanics will not be able to recover their lost wages.

On the other hand, if the injunction is granted and it later turns out that the new regulations are valid, the government will incur unnecessary additional construction costs and contractors may lose some profits. Also,

semi-skilled workers will miss out on additional employment opportunities in the interim. None of those parties will be able to recoup their losses.

The harm that plaintiffs would face if regulations (that turn out to be invalid) are put into effect is counterbalanced by the harm that would befall the government, its contractors and semi-skilled helpers if this Court delays implementation of regulations (that turn out to be valid). For this reason, this Court finds that the equities do not "strongly favor interim relief." *See Washington Metro. Area Transit Com.*, 559 F.2d at 843.

Accordingly, it is this 30th day of January 1991

ORDERED That the plaintiffs' motion for injunction pending appeal be and it is hereby denied, and it is further

ORDERED That the plaintiffs' request for a hearing on their motion be and it is hereby denied.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-1631

BUILDING AND CONSTRUCTION TRADES, *et al.*,
Plaintiffs,

v.

RAYMOND J. DONOVAN, *et al.*,
Defendants.

ORDER

[Filed Dec. 21, 1984]

The Court has considered defendants' motion for modification of Judgment in accordance with the decision of the Court of Appeals affirming in part and reversing in part this Court's order of January 17, 1983, which declared invalid and enjoined nine regulations issued by the Department of Labor. The Court of Appeals upheld three of the nine regulations,[1] affirmed this Court's injunction as to another four,[2] and declined to rule on the two remaining regulations—items five and six in the Court's January 17, 1983 Order[3]—which govern the use of help-

---

[1] *I.e.*, items one, two, and four.

[2] *I.e.*, items three, seven, eight, and nine.

[3] Instead, the Court of Appeals noted in a footnote the following:

> The District Court enjoined the operation of all the new regulations governing the use of helpers, including the 40% rule, the procedure for conforming existing contracts to the new regulations, and the procedure for a variance from the 40% rule for certain existing projects . . . . Nevertheless, like the

ers. *Building and Construction Trades' Dept. AFL-CIO v. Donovan*, 712 F.2d 611 (D.C. Cir. 1983).

Because the Court of Appeals did not set aside this Court's rulings with respect to items five and six, the injunction as to these two regulations remains in effect.[4]

---

unions in this court, the District Court only discussed the expanded definition of "helper" and the provision that a helper classification need only be "identifiable" in an area to be used. Evidently, the court regarded the helper provisions as a package, the essential elements of which were the two it discussed; once those were struck down, there was no need to deal with the others since the Secretary would surely redraft the package, perhaps changing the minor aspects of it in the process. Not having the benefit of any significant discussion of the issues, we decline to rule on these aspects of the helper provision. Should the Secretary includ them in any reissued rules, we will not be barred from considering them then.

712 F.2d at 624 n.7. The Court reiterated in another footnote that it had "not been provided with a significant discussion of the issues regarding the 40% cutoff and therefore do not here pass on the propriety of it." 712 F.2d at 630 n.11.

[4] Defendants argue that this Court's injunction with respect to item three should also be rescinded except to the extent that it permits the use of helper classifications which do not prevail in the area. Item three, or 29 C.F.R. Section 1.7(d), published at 47 Fed. Reg. 23,655, provides as follows:

> Classification and wage rates will be issued for identifiable "classes of laborers and mechanics." Semi-skilled classifications of helpers will be issued when the classification are identifiable in the area. The use of helpers, apprentices and trainees is permitted in accordance with Part 5 of this subtitle.

The Court of Appeals struck down the provision requiring that a helper classification need only be "identifiable" in an area because it found that such provision undermines the fundamental purpose of the Act—*i.e.*, "that wages on federal construction projects mirror those locally prevailing." 712 F.2d at 624.

The "identifiable-classification" goes to the heart of this regulation. The Court will therefore not rescind its injunction as to item three. This does not mean, however, that the Secretary of Labor is precluded from issuing a new regulation concerning classification and wage rates for classes of laborers and mechanics provided, of course, that it conforms to the decision of the Court of Appeals.

Defendants may, however, submit to this Court reissued regulations governing the use of helpers, and if these regulations conform to the decision of the Court of Appeals, they will be approved.

Accordingly, it is this 21st day of December, 1984,

ORDERED that defendants' motion for modification of judgment be and it is hereby granted; and it is further

ORDERED that the Order of this Court filed on January 17, 1983, amending the order of December 23, 1982, be and it is hereby modified by rescinding the injunction and declaration entered with respect to the following regulations published in the Federal Register by the Secretary of Labor on May 28, 1982 concerning the Davis-Bacon Act and the Copeland Anti-Kickback Act:

1. 29 C.F.R. Section 1.3(d), published at 47 Fed. Reg. 23,652 (exclusion of Davis-Bacon construction in wage determinations);

2. 29 C.F.R. Section 1.7(d), published at 47 Fed. Reg. 23,655 (exclusion of metropolitan data in wage determinations); and

3. 29 C.F.R. Section 5.2(n)(4), published at 47 Fed. Reg. 23,667 (helpers).

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

APPENDIX H

FEDERAL REGISTER

Vol. 55, No. 233

Tuesday, December 4, 1990

DEPARTMENT OF LABOR

Employment Standards Administration, Wage and Hour Division

Office of the Secretary

29 CFR Parts 1 and 5

Procedures for Predetermination of Wage Rates; Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction and to Certain Nonconstruction Contracts

AGENCY: Wage and Hour Division.
Employment Standard Administration, Labor.

ACTION: Establishment of effective date.

SUMMARY: This document provides the effective date for amended Regulations, 29 CFR parts 1 and 5, governing the use of semi-skilled "helpers" on federally-financed and assisted construction contracts subject to the Davis-Bacon and Related Acts (DBRA). This final rule was previously published in the Federal Register (54 FR 4234) on January 27, 1989. The implementation of an earlier version of this rule was enjoined by the U.S. District Court for the District of Columbia on July 22, 1982. Following promulgation of the revised final regulation, that injunction was vacated on September 24, 1990.

EFFECTIVE DATE: February 4, 1991.

FOR FURTHER INFORMATION CONTACT:

Samuel D. Walker, Acting Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, DC 20210. Telephone (202) 523-8305. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION

Background

The Department of Labor (DOL) attempted to implement helper rules in May 1982. (See 47 FR 23858 (May 28, 1982); 47 FR 32070 (July 20, 1982).) Among other provisions, lower paid helpers would have been allowed on DBRA projects under a broad definition of duties and in a maximum ratio of two helpers for three journeymen whenever the helper classification was "identifiable" in an area. The rules were enjoined by the U.S. District Court for the District of Columbia in a lawsuit brought by the Building and Construction Trades Department, AFL-CIO, and a number of individual unions (*Building and Construction Trades Department, AFL-CIO, et al.* v. *Donovan, et al.*, 543 F. Supp. 1282, 553 F. Supp. 352).

On appeal, the Court of Appeals for the District of Columbia Circuit upheld DOL's authority to allow an expanded use of helpers and approved the regulatory definition of a helper's duties (*Building and Construction Trades Department, AFL-CIO, et al.* v. *Donovan, et al.*, 712 F.2d 611). However, that ruling required that the regulations be modified to require that DOL first find the use of a particular helper classification prevailing in an area (rather than identifiable) before it may be used. The court concluded that allowing a lower paid helper classification to be used on DBRA work when that classification was only "identifiable" would result in payment of less than prevailing wages for some work, which is prohibited by the DBRA. The court did not rule on the re-

maining helper provisions. *Certiorari* was denied by the Supreme Court (464 U.S. 1069).

The District Court subsequently issued an order which lifted the injunction on the definition of helper but continued the injunction against all the other helper provisions, and stated that DOL could "submit to this court reissued regulations governing the use of helpers, and if these regulations conform to the decision of the court of appeals, they will be approved." (*Building and Construction Trades Department, AFL-CIO, et al.* v. *Donovan, et al.*, 102 CCH Labor Cases para. 34,648 (December 21, 1984)).

DOL reexamined the enjoined provisions to the extent required by the court rulings and on August 19, 1987, issued a new proposal with necessary revisions (52 FR 31366).

Comments were invited on several alternatives for determining if the use of a helper classification prevailed.

The Department published a final rule on January 27, 1989 (54 FR 4234), stating therein that once the injunction against implementation of some provisions was lifted, the Department would publish a notice providing for an effective date 60 days thereafter. The Department submitted the revised rules to the District Court in accordance with the court's decision of December 21, 1984. The court vacated the injunction on September 24, 1990. (*Building and Construction Trades Department, AFL-CIO, et al.* v. *Dole, et al.*, Civil Action No. 82-1631).

Summary of Rule

To determine whether a helper classification prevails, the Department has adopted a scheme patterned after the codified regulatory standards for determining the prevailing wage for a given classification. Section 1.7(d) provides a decision that proceeds in two steps:

(1) If the prevailing journeylevel wage is set by the "majority rule" (29 CFR 1.2(a)(1); more than 50 percent of the journeymen are paid the same rate), then the practice followed by those contractors whose rates prevail for the journeymen is also deemed the prevailing practice for determining whether a helper classification prevails, or,

(2) If no majority journeylevel rate exists and the prevailing wage is set by the "weighted average rule" (29 CFR 1.2(a)(1); the average of the wages paid to the journeymen, weighted by the total journeymen in the classification), then the total number of workers in the classification employed by contractors using helpers (journeymen plus apprentices, trainees and helpers) will be compared to the total number of workers in the classification employed by contractors not using helpers (journeymen plus apprentices and trainees); the practice covering the larger number of workers will decide whether a helper classification prevails.

The notice of proposed rulemaking made no changes to the helper definition at § 5.2(n)(4) promulgated in 1982. It was repeated in the preamble of the 1987 proposal for informational purposes only, and is implemented herein. The rule defines a helper as a semi-skilled worker who works under the direction of and assists a journeyman. Helpers are able to perform a broad range of duties under a journeyman's supervision; the duties vary according to area practice.

Section 5.5(a)(1)(ii)(A) sets forth special criteria under which helper classifications and wage rates can be "conformed" (i.e., added after the wage determination has been issued) if a particular wage determination does not contain a helper classification. This section provides, as did the rule promulgated in 1982, that helper rates can be conformed without regard to the longstanding requirement, applicable to all other conformance actions, that the work of a proposed classification to be conformed

not be performed by another classification already listed in the wage determination. In addition, a provision was added as a result of the court of appeals decision to require that helper classifications may be conformed only where they prevail in the area covered by the wage determination.

The enjoined 1982 regulations contained a numerical limitation on the use of helpers: Two helpers for every three journeymen, or not more than 40 percent of the total number of helpers and journeymen, in the contractors' work force on the job site. (A one-helper-to-five-journeymen ratio was originally proposed, but was raised to 2:3 in the final rule in response to public comments that 1:5 was too restrictive and would not reflect the actual number of helpers used in the industry.)

Helpers employed in excess of this ratio would be required to be paid the applicable journeymen (or laborer's where appropriate) wage rate for the work actually performed. To insure that this ratio does not disrupt existing established local practices in areas where DBRA wage determinations currently contained helper classifications without any limitation on the number permitted. DOL will consider requests for variances from the ratio limitation prior to bid opening on a contract, if supported by a showing that the DBRA wage determination for the type of construction in effect in the area before the effective date of the final helper regulations contained a helper classification, and that there was a practice in the area of utilizing such helpers in the classification on DBRA projects in excess of the two-to-three ratio.

The ratio and variance provisions were not open for additional comment in the 1987 proposed rulemaking and are implemented herein.

Paperwork Reduction Act

The information collection requirements contained in § 5.5(a)(1)(ii) of part 5 were previously approved by

the Office of Management and Budget under the Paperwork Reduction Act and assigned OMB Control number 1215-0140.

Dates of Applicability

This regulation shall be effective February 4, 1991.

The revisions to § 1.7(d) of part 1 shall be applicable only as to wage determinations issued based on wage surveys completed on or after the effective date of this revised rule. A wage survey will be deemed to be completed as of the cut-off date established for submission of wage data.

The revisions to §§ 5.2 and 5.5 of part 5 shall be applicable only as to contracts entered into pursuant to invitations for bids issued or negotiations concluded on or after the effective date of this revised rule. None of the revisions herein shall be applicable to any contract entered into prior to such date.

This document was prepared under the direction and control of Samuel D. Walker, Acting Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

Lists of Subjects

29 CFR Part 1

Administrative practice and procedures, Government contracts, Labor, Minimum wages, Wages.

29 CFR Part 5

Administrative practice and procedures, Government contracts, Labor, Minimum wages, Penalties, Reporting and recordkeeping requirements, Wages.

Signed at Washington, DC on this 28th day of November, 1990.

Roderick A. DeArment,
Acting Secretary of Labor.

William C. Brooks,
Assistant Secretary for Employment Standards.

Samuel D. Walker,
Acting Administrator, Wage and Hour Division.

Accordingly, an effective date of February 4, 1991 is established for 29 CFR parts 1 and 5, which were published in the Federal Register of January 27, 1989 (54 FR 4234).

For the convenience of the public, the rules are hereby republished as set forth below:

PART 1—PROCEDURES FOR PREDETERMINATION OF WAGE RATES

2. The authority citation for part 1 continues to read as follows:

> Authority: 5 U.S.C. 301: R.S. 161.64 Stat. 1267; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 29 U.S.C. 259: 40 U.S.C. 276a-278a-7: 40 U.S.C. 276c; and the laws listed in Appendix A of this Part.

2. Section 1.7 is amended by adding a new paragraph (d) to read as follows:

§ 1.7 Scope of consideration.

* * * * *

(d) The use of *helpers*, *apprentices* and *trainees* is permitted in accordance with part 5 of this subtitle. Wage rates for semi-skilled classifications of helpers will be issued when the classifications are prevailing in the area. In determining whether use of a particular helper classification prevails in the area, the Administrator will follow the criteria set forth in paragraphs (d)(1) and (d)(2) of this section.

(1) If the prevailing wage for a particular journeyman classification is a wage that is paid to the majority

of the journeymen in the classification as defined in § 1.2(a)(1) of this part, then the practice followed by those contractors whose rates are adopted as prevailing for the journeyman shall also be deemed the prevailing practice in determining whether to issue a helper classification. Any ambiguity with regard to such practice, will be resolved by following the rule in paragraph (d)(2) of this section with respect to those contractors.

(2) If the prevailing wage for a particular journeyman classification is the average of the wages paid to the journeymen, weighted by the total number of journeymen in the classification as defined in § 1.2(a)(1) of this part, then the total number of workers in the classifications employed by contractors utilizing helpers (journeymen plus apprentices, trainees, and helpers as defined in § 5.2(n)(4) of this chapter) on reported projects will be compared to the total number of workers in the classification employed by contractors not utilizing helpers (journeymen plus apprentices and trainees as defined in § 5.2(n)(4) of this chapter), and the practice which covers the majority of such workers shall be deemed the prevailing practice in determining whether to issue a helper classification.

PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)

Subpart A—Davis-Bacon and Related Acts Provisions and Procedures

3. The authority citation for part 5 continues to read as follows:

> Authority: 40 U.S.C. 276a-276a-7; 40 U.S.C. 276c; 40 U.S.C. 327-332; Reorganization Plan No.

14 of 1950, 5 U.S.C. Appendix; 5 U.S.C. 301; 29 U.S.C. 259; and the statutes listed in § 5.1(a) of this part:

4. Section 5.2 is amended by revising paragraph (n) introductory text and by adding paragraph (n)(4) to read as follows:

§ 5.2 Definitions.

* * * * *

(n) The terms apprentice, trainee, and helper are defined as follows:

* * * * *

(4) A *helper* is a semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and holding materials or tools; and other related, semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice.

* * * * *

5. Section 5.5 is amended by revising paragraph (a)(1)(ii)(A) and adding a new paragraph (a)(4)(iv), to read as follows:

§ 5.5 Contract provisions and resisted matters.

(a) * * *

(1) * * *

(ii)(A) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to

be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met.

(*1*) Except with respect to helpers as defined in 29 CFR 5.2(n)(4), the work to be performed by the classification requested is not performed by a classification in the wage determination; and

(*2*) The classification is utilized in the area by the construction industry; and

(*3*) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination; and

(*4*) With respect to helpers as defined in 29 CFR 5.2(n)(4), such a classification prevails in the area in which the work is performed.

* * * * *

(4) * * *

(iv) *Helpers.* Helpers will be permitted to work on a project if the helper classification is specified on an applicable wage determination or is approved pursuant to the conformance procedure set forth in § 5.5(a)(1)(ii). The allowable ratio of helpers to journeymen employed by the contractor or subcontractor on the job site shall not be greater than two helpers for every three journeymen (in other words, not more than 40 percent of the total number of journeymen and helpers in each contractor's or in each subcontractor's own work force employed on the job site). Any worker listed on a payroll at a helper wage rate, who is not a helper as defined in 29 CFR 5.2(n)(4), shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any helper performing work on the job site in excess of the ratio

permitted shall be paid not less than the applicable journeyman's (or laborer's, where appropriate) wage rate on the wage determination for the work actually performed.

* * * *

[FR Doc. 90-28297 Filed 12-3-90; 8:45 am]

BILLING CODE 4510-27-41

APPENDIX I

FEDERAL REGISTER

Vol. 54, No. 17

Friday, January 27, 1989

DEPARTMENT OF LABOR

Employment Standards Administration

Wage and Hour Division

Office of the Secretary

29 CFR Parts 1 and 5

Procedures for Predetermination of Wage Rates; Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction and to Certain Nonconstruction Contracts

Editorial Note: This reprint incorporates a correction that is published in the Federal Register of Thursday, February 2, 1989.

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (DOL) is revising the regulations governing the use of semiskilled "helpers" on federally-financed and assisted construction contracts subject to the Davis-Bacon and Related Acts (DBRA). This rule makes final the regulations for determining when the use of a helper classification will be found by DOL to be prevailing in an area to allow its use on construction projects subject to DBRA prevailing wage requirements. This rule also implements other regulations, previously issued as final regulations but not yet implemented because of court orders, concerning use of helpers on such projects.

EFFECTIVE DATE: After the injunction against implementation of some provisions of this regulation is lifted by the U.S. District Court for the District of Columbia, a notice will be published in the Federal Register providing an effective date 60 days thereafter.

FOR FURTHER INFORMATION CONTACT: Paula V. Smith, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW., Washington, DC 20210. Telephone (202) 523-8305. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On August 19, 1987, DOL published in the Federal Register (52 FR 31366) proposed revisions to the regulations on labor standards applicable to federally-financed and assisted construction contracts subject to the prevailing wage standards of DBRA (29 CFR Parts 1 and 5). The proposal was intended to allow contractors to expand their use of semiskilled helpers on DBRA projects at wages lower than those required to be paid to skilled journeymen if the use of the helper classification was found to be a prevailing practice on construction projects in the area. This proposal resulted from DOL's reexamination of revised regulations previously issued in 1982 (47 FR 23644; 23658), which had been enjoined in a lawsuit filed by the AFL-CIO (*Building and Construction Trades Department, AFL-CIO, et al.*, v. *Donovan, et al.*, 712 F.2d 611 (D.C. Cir. 1983)).

Public comments were invited for 60 days on several proposed methods for determining if the use of a helper classification prevailed in an area. The comment period was subsequently extended for 30 additional days, and closed on November 18, 1987 (52 FR 38473; October 16, 1987). Approximately 2,000 comments were received on the proposal, which included submissions from the Building and Construction Trades Department, AFL-CIO ("BCTD"), the Laborers' International Union, individ-

ual trade unions (primarily locals from Texas, Oklahoma, and Georgia), The Associated General Contractors of America (AGC), The Associated Builders and Contractors, Inc. (ABC), the National Association of Home Builders, the Construction Committee of the Business Roundtable, the U.S. Chamber of Commerce, the American Subcontractors Association, the National Association of Manufacturers, the National Elevator Industry, Inc. (and 28 member firms), the Sheet Metal and Air Conditioning Contractors' National Association, the U.S. Small Business Administration (SBA), the U.S. Department of Energy (DOE), the American Farm Bureau Federation, individual contractors, and individuals. This document provides the text of the final rule of the method selected and explains the reasons for that selection and for any changes from the proposal that were made in response to the comments received.

Background

DOL attempted to implement helper rules in May 1982. (*See* 47 FR 23644, 23658 (May 28, 1982); 47 FR 32070 (July 26, 1982).) Among other provisions, lower paid helpers would have been allowed on DBRA projects under a broad definition of duties and in a maximum ratio of two helpers for three journeymen whenever the helper classification was "identifiable" in an area. The rules were enjoined by the U.S. District Court for the District of Columbia in a lawsuit brought by the BCTD and a number of individual unions (*Building and Construction Trades Department, AFL-CIO, et al.*, v. *Donovan, et al.*, 543 F. Supp. 1282, 553 F. Supp. 352).

On appeal, the Court of Appeals for the District of Columbia Circuit upheld DOL's authority to allow an expanded use of helpers and approved the regulatory definition of a helper's duties (*Building and Construction Trades Department, AFL-CIO, et al.*, v. *Donovan, et al.*, 712 F.2d 611). However, that ruling required that the

regulations be modified to require that DOL first find the use of a particular helper classification *prevailing* in an area (rather than identifiable) before it may be used. The court concluded that allowing a lower paid helper classification to be used on DBRA work when that classification was only "identifiable" would result in payment of less than prevailing wages for some work, which is prohibited by the Act. The court did not rule on the remaining helper provisions. *Certiorari* was denied by the Supreme Court (46 U.S. 1069).

The District Court subsequently issued an order which lifted the injunction on the definition of helper but continued the injunction against all the other helper provisions, and stated that DOL could "submit to this court reissued regulations governing the use of helpers, and if these regulations conform to the decision of the court of appeals, they will be approved." (*Building and Construction Trades Department, AFL-CIO, et al.*, v. *Donovan, et al.*, 102 CCH Labor Cases para. 34, 648.

DOL reexamined the enjoined provisions to the extent required by the court rulings and on August 19, 1987, issued a new proposal with necessary revisions (52 FR 31366). Comments were invited on two primary alternatives, and three subordinate alternatives, for determining if the use of a helper classification prevailed, as follows:

Option A: This option, patterned after the codified regulatory standards for determining the prevailing *wage* for a given classification, provided a decision rule that proceeded in two steps:

(1) If the prevailing *journeyman* wage is set by the "majority rule" (29 CFR 1.2(a)(1); more than 50 percent of the journeymen are paid the same rate), then the practice followed by those contractors whose rates prevail for the journeymen is also deemed the prevailing practice for determining whether a helper classification prevails, or,

(2) If no majority jorneyman rate exists and the prevailing wage is set by the "weighted average rule" (29 CFR 1.2(a)(1); the average of the wages paid to the journeymen, weighted by the total journeymen in the classification), then the total number of workers in the classification employed by contractors using helpers (journeymen plus helpers) will be compared to the total number of workers in the classification employed by contractors *not* using helpers (journeymen only); the practice covering the larger number of workers will decide whether a helper classification prevails.

Option B: Compare the total number of workers (journeymen plus helpers) in the classification employed by contractors using helpers to the total number of workers in the classification employed by contractors not using helpers (journeyman only). The practice which covers the majority of the workers will in all cases determine whether use of a helper classification prevails. (This is the same as step 2 of Option A.)

Options C, D, and E: The preamble to the proposal also invited comments on three additional alternatives considered in formulating the proposal, namely, count by: (C) the number of projects on which helpers are employer: (D) the dollar value of construction projects on which helpers are employed; and (E) the number of contractors employing helpers.

The notice of proposed rulemaking proposed no changes to the helper definition promulgated in 1982. It was repeated in the preamble of the 1987 proposal for informational purposes only as follows:

Sestion 5.2 Definitions

* * * * *

(n) The terms apprentice, trainee, and helper are defined as follows:

* * * * *

(4) A "helper" is a semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials, tools, equipment, and supplies and maintaining them in order, cleaning and preparing work areas; lifting, positioning, and holding materials or tools; and other related, semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice.

* * * * *

Summary of Comments

Issue: Methodology for determining if helpers "prevail"—proposed Option A through E.

Comments

SBA stated that Option A should be adopted, because it most closely conforms to the court's mandate in the underlying litigation and would more likely surive any possible court challenge. SBA noted that since Option A is specifically supported by existing Davis-Bacon case law, in particular the precedential ruling of DOL's Wage Appeals Board in *Fry Brothers Corp.*, WAB Case No. 76-6 (June 14, 1977), whereas Option B could produce anomalous results in wage determinations, the importance of implementing a workable helper rule weighs in favor of selecting an approach which is legally sound. (The Wage Appeals Board ruled in *Fry Brothers Corp.* that if the union journeyman rate is found prevailing for a classification, the union practice of not using helpers must also be found prevailing for purposes of Davis-Bacon wage determinations regardless of how many helpers are employed by nonunion contractors in the area.) SBA suggested that to the extent Option B deviates from the principles established in *Fry Brothers Corp.*, grounds

could exist for the court to again enjoin the rules. SBA also postulated that the number of instances where the choice between Option A and Option B would make a difference should not be large. Normally either the unionized journeymen will substantially outnumber their nonunion counterparts, or vice versa, so that the number of helpers will make no material difference; or, no majority rate will prevail in either direction so that the "weighted average" rule would achieve the same results under either Option A or Option B, SBA asserted.

DOE noted Option A's consistency with established practices for determining prevailing wages, as opposed to Option B being inconsistent with such practices. DOE considered Options C, D, and E to be unacceptable because they all use criteria that are substantially removed from the number of *employees* (and thus don't consider the extent of the practice of using helpers) performing the work of a craft in a specific area.

The Business Roundtable favored Option A on the grounds that it would be more easily administered and would therefore be put into effect more rapidly.

Most of the major business and industry groups commenting (including Chamber of Commerce, AGC, ABC) stated a preference for Option B because it takes the number of helpers into consideration in all cases and may more often result in helpers prevailing, but without providing any detailed rationale to support their particular views. For example, while ABC characterized Option B as more accurate and fairer than Option A, ABC urged expeditious selection of the option which would best yield "prevailing" helper classifications and best withstand judicial review. The Chamber of Commerce argued that fewer journeymen are used where helpers are employed, which would give an advantage under Option A to journeymen on projects where helpers are not employed. Several of these industry commenters and others made the observation, in distinguishing between Options A and B,

that Option A is supported by past precedential rulings of DOL's Wage Appeals Board (particularly citing *Fry Brothers Corp.*), and for this reason was more legally defensible than Option B. Furthermore, the ABC and the American Subcontractors Association (ASA), like the SBA, expressed the view that there would be little practical difference between the results in Options A and B.

AGC noted that Option B was the same as Option A under the weighted average method of Option A, but suggested that B has an advantage by concentrating on the actual number of workers in a classification using helpers as the primary criterion for determining area practice, in contrast to the other, more indirect indicators of area practice found in options C through E which do not include a weighting factor based on total employment in a classification.

Proposed Options C (projects), D (dollar value), and E (contractors) generated no substantial support in the comments (American Farm Bureau Federation recommended C or E; National Association of Home Builders preferred E over B; ASA found C and E "acceptable," but faulted them for not having any precedential basis in prior administrative practices; ABC, ASA, and the Chamber of Commerce considered D to be totally unacceptable). ABC suggested that Options C and E are more consistent with the word "prevailing" than either A or B. Many of the comments suggested that linking the method to projects, dollar value of construction, or contractors would establish an area practice by relating it to a variable that may have little or no relationship to the actual use of helpers in an area.

The BCTD and Laborers Union asserted that the proposed statistical formulas will result in recognition of a helper classification when it is merely an *identifiable*, rather than prevailing, area practice, which would be contrary to the court rulings on the challenged 1982 regulations. To illustrate, the BCTD contended that if only

one helper worked on a project with 100 journeymen, compared to another 100 journeymen working on projects where no helpers were employed, the proposed formula would recognize helpers as prevailing since the majority of workers in the classification (101 out to 201 or 50.2 percent) are employed on a project with a helper, yet the helper would constitute less than ½ of 1 percent of the total workers working in the classification. Likewise, the BCTD suggested another example under which 20 helpers, working with 30 journeymen, compared to 49 journeymen on projects with no helpers, would yield "prevailing" helpers yet helpers would comprise roughly 20 percent of the total workers in the classification. Moreover, under this scenario, the *majority of journeymen*, 49 compared to 30 (or over 62 percent) would have been working on projects without any helpers.

The BCTD and Laborers Union also commented that the method for determining if a helper classification prevails should include conducting task-oriented, duties-based area practice surveys (an analysis of the prevailing craft content of work performed by the helpers in the area employed in the classification proposed to be recognized), since the definition of "helper" provides that "the particular duties performed by a helper vary according to area practice." Furthermore, they argue that the methodology should take into account locally prevailing practices concerning how semiskilled laborer classifications are used, contending that the duties to be performed by proposed "helpers" are the same in many cases as those performed by laborers. In this regard, the Laborers Union included with its comments copies of DOL's current general wage determinations to demonstrate the numerous laborer classifications that are currently recognized throughout the country as "prevailing" under DBRA, allegedly already performing the same duties proposed to be performed by helpers. However, no explanation of how laborers meet the helper definition or description of their duties was provided. The BCTD and Labores Union also stated that

DOL's rulemaking expressly recognized that new, lower paid helpers would substitute for currently prevailing laborers since the Regulatory Impact Analysis stated that such a substitution effect could occur in the estimate of annual cost savings.

The BCTD recommended an alternative method for determining if helpers prevail which would compare the total number of workers found in a prevailing area practice survey to be *classified* as "helper" as defined in the regulations, to the total number of laborers and mechanics other than "helpers" (regardless of classification title) performing the same helper-type duties; the classification practice which covers the majority of the workers would determine whether to issue a helper classification. Under this approach, a helper classification would be recognized as prevailing only if the majority of the workers who performed helper-type duties were expressly classified by contractors as "helpers".

The BCTD expressed an additional concern that helpers will displace (i.e., substitute for) formally-registered apprentices and trainees and destroy the union apprenticeship system. In contrast to the BCTD's view that the method for determining prevailing helpers should consider helpers separately from all other classifications that perform the same helper type duties, the BCTD suggested that all subjourneymen classifications should be *combined* with helpers when applying the two-helpers-for-three-journeymen ratio limitation (i.e., two helpers, apprentices, and/or trainees *combined* for every three journeymen in the contractor's workforce).

AGC suggested that determining the prevalence of helpers in an area should not be difficult if primary consideration is given to the work actually performed by helpers as defined in the regulations, as distinguished from the title of the worker's craft or trade. AGC stated that both union and open shop contractors may use laborers as helpers; in a union setting laborers often work

under the supervision of carpenters, bricklayers, cement masons and other trades, while in an open shop setting the use of helpers and laborers under the supervision of skilled craftsmen can be unlimited. AGC recommended that the regulations emphasize that position or job title is not controlling in identifying "helpers".

ABC and the Business Roundtable stated there was an increasing trend in recently negotiated collective bargaining agreements to create new semiskilled union job classifications which fall within the definition of "helper," although they often are not so named. These commenters suggested that DOL recognizes such "subjourneymen" classifications as actually consisting of helpers, where appropriate, and count such workers as helpers in determining whether helper classifications prevail in a given area.

Although commenters were requested to provide specific information and documentation concerning local practices of using helpers, no such information was received.

Discussion

Before addressing the specific options, it is necessary to address first the issue raied by the BCTD and laborers Union of whether area practice surveys of the precise duties performed need be routinely conducted prior to determining whether a helper classification prevails in a locality.

Historically, the Department permitted the use of a helper classification only if the helper performed duties which were separate and distinguishable from those of journeymen and other classifications in the wage determination (helpers could not generally use "tools of the trade"). The new regulatory definition of "helper" approved by the courts allows a helper's duties to overlap with the duties performed by journeymen, so long as the work is performed under a journeyman's supervision.

The new definition therefore differentiates a helper primarily in terms of whether the helper is performing under the direction and supervision of a journeyman, a supervisory-based distinction rather than the former task-oriented one. (*See* 712 F.2d at 622-623, "While some distinction between skilled and semiskilled tasks would be retained, the essential functional distinction would be not the nature of the task done but rather the subordinate position of the helper vis-a-vis a journeyman." * * * Id., at 626, "The central objection to the Secretary's new regulation is that it would no longer define the 'classes' of laborers and mechanics by the tasks a particular employee does, but rather in large part by whether he or she is acting under the supervision of a journeyman." * * *; Id., at 627, "We see nothing inherently task-oriented about the term 'classes.'" * * *; Id., at 628, "* * * we are unwilling to read the fairly ambiguous legislative references to a task-based classification system in such a way as to vitiate the clearly expressed congressional purpose to have federal wages mirror those prevailing in the area." * * *; Id., at 629, "We simply say that the core concept of that term—that those things within the class be differentiable from those things outside of it—is not weakened by a definition that makes the common element supervision by journeymen rather than use of tools." * * *; Id., at 630, "The Secretary's definition here is not clearly unreasonable or on its face impossible to enforce. First, the distinction between supervised and supervising personnel is a common one in the labor field. It is thus not a completely untested distinction nor one that has proven impossible to draw. * * *")

In view of the Court of Appeals broad endorsement of the expanded definition of a helper's duties, which permits overlap with the duties of journeymen and distinguishes helpers on the basis of subordinate/supervisory distinctions vis-a-vis the journeymen rather than on the *former* basis of differentiating between classes by craft content and the particular duties performed, it is DOL's position that

there is no need to conduct routine, detailed area practice surveys to determine the precise and specific craft content of helper classifications, as suggested by the union comments. Thus, under DOL's proposed approaches, data on helpers would be collected in the normal course of wage surveys. If required, any functional analysis of a helper's duties would be based on follow-up inquiries to survey respondents who indicated that they used helper classifications to assist journeymen. The WD-10 survey forms would be redesigned to include the general helper definition, and respondents would be advised to utilize the definition in reporting employees as helpers in the survey. Questions as to whether a particular duty is within the scope of a helper classification or as to whether workers have properly been counted as helpers would be resolved if necessary during the wage survey process, or after the wage determination has been issued through standard investigation procedures that include area practice surveys, where appropriate.

Such an approach is currently followed with respect to all other classifications. We do not presently conduct detailed area practice surveys to determine the precise duties of every classification when issuing wage determinations. Only when a question of fact arises as to which craft performs a particular duty (i.e., work which may have been traditionally performed by employees in one classification is also performed by workers in another classification *and at a different wage rate*), is the need for an area practice survey indicated. For example, carpentry work may include the installation of drywall. A wage survey may disclose that a classification of "drywall hanger" is also performing a *significant portion* of the drywall work in the area. To accurately determine the prevailing wage for drywall work, an area practice survey is conducted in conjunction with the wage survey. "This may take the form of *simply analyzing the list of subcontractors submitted along with the classification and*

wage data provided by each, or it may involve a telephone or mail survey to clarify the duties of each carpenter. Once this additional information is gathered, wage rates for all those doing drywall work, whether classified as carpenter or drywall hanger, may be used in the usual way to compute the prevailing rate." (DB Wage Determinations Manual of Operations, pp. 40-41: emphasis added.)

Conducting routine, detailed area practice surveys as suggested would also be impractical and precluded by limited available program resources. Finally, in our efforts to achieve practical implementation of the helper regulations, we have also had to consider the responsibilities imposed upon federal agencies under the Paperwork Reduction Act, and have given necessary weight to the conern that a significant increase in the response burdens for collecting information that details the particular duties performed by helpers during wage and area practice surveys would likely produce an adverse chilling effect on voluntary participation in future wage surveys.

With respect to the union comments that the helper definition overlaps the duties of laborers, the current proposal, as envisioned in the earlier rulemaking, was never intended to disrupt existing established local practices, long recognized by the Department, concerning the use of laborers in the construction industry, and on DBRA projects, nor was it intended to disrupt the apprenticeship system. Rather, the proposal was intended to respond to a real problem, documented by industry representatives, that federal construction practices under DBRA did not permit the widespread practice of using semiskilled helpers to do craft work, with the result that federally required wages were significantly higher than the wages actually being paid in the private sector for some construction work (*see*, 712 F.2d at 628; 629-630). As SBA noted in its comments, the general prohibition against the use of helpers on DBRA work often meant that contrac-

tors on federal projects were forced to classify and pay their helpers at higher journeyman rates in order to continue using their customary labor force, or use their higher paid journeymen to perform lesser-skilled tasks normally performed by their helpers, either of which proposition increased the contractor's cost on DBRA work above what would have been incurred on private, non-DBRA work. DOL's Preliminary Regulatory Impact Analysis estimated that these increased costs range from $422 million to $610 million per year. Once the existing restrictions prohibiting the use of helpers are lifted and the new helper regulations are implemented, contractors will be provided the flexibility to restructure their workforces *on DBRA* projects in a manner (as currently done in the private sector) that will allow semiskilled employees formerly prohibited under DBRA from performing any work of a trade to perform duties that overlap those of journeymen in the craft, including the use of tools of the trade under the direction and supervision of the journeymen.

However, upon review, we have determined that it is highly unlikely that helpers will substitute for laborers as the Preliminary Regulatory Impact Analysis suggested may occur. (See the related discussion below on the Regulatory Impact and Flexibility Analyses.) We view, both in the context of traditional Davis-Bacon administration as well as in the current rulemaking, the laborer classification to be distinctly different from the helper category. It has been our experience that laborers, by and large, are not semiskilled workers, do not typically perform tasks using the tools of the trade that overlap those performed by workers in the skilled trades, and do not typically *directly assist* such workers in the skilled trades under a journeyman's direct supervision within the meaning intended by the helper definition. Nor have any of the commenters submitted evidence that laborers do meet these aspects of the helper definition. The fact that many

of the union laborer classifications are presently recognized by DOL as prevailing under current practices to perform duties that are separate and distinct from journeymen in the skilled trades is not directly relevant to the prospective determinations that will be made, under the revised regulations, of whether there is a prevailing practice to utilize helpers whose duties overlap those of journeymen in performing semiskilled tasks in the skilled trades under the journeymen's direction and supervision. It is the problem with respect to these workers, and not laborers, which the regulation was intended to address. The so-called "helper" and "tender" classifications contained in union laborer agreements are not intermediate classifications within the skilled trades; i.e., a "carpenter tender," for example, is normally an unskilled employee whose duties are prescribed in the *laborers'* union agreement, rather than an *intermediate* (semiskilled) classification of *carpenter.*

While there may be some overlap between *a portion* of the duties contained in the helper definition and those to be performed by laborers in some areas with respect to certain "set-up," material handling, and other tasks that do not involve the performance of semiskilled tasks of the trade under a journeyman's direct supervision, it is DOL's view that, for the most part, laborer classifications will not generally meet the definition set forth for the helper classification. Accordingly, extensive studies and detailed analyses of locally-prevailing, fine distinctions between the particular duties performed by laborers and those performed by helpers, as suggested by the BCTD and Laborers Union should not generally be required.

The BCTD's recommended alternative approach would compare all those workers found to be *classified* as "helper" to all other semiskilled classifications (with other titles) that perform the same helper-type duties (e.g., laborers (if appropriate), "tenders," apprentices, trainees, etc.), and the predominant classification practice, covering the

specified helper duties determined through area practice surveys, would determine whether to issue a helper classification.

The unions' argument misses the point. As the Court of Appeals recognized, the helper definition abandons the prior DOL practice of focusing on the tasks performed, which did not permit more than one classification to perform the same work. The current definition emphasizes instead that helpers work under the direction and supervision of a journeyman, to assist that journeyman. The definition clearly contemplates, by stating that helpers may (i.e., are permitted to) use the tools of the trade, that there will be more than one classification permitted to perform the same duties. Thus, the question is not what classification prevails with respect to specific duties, but whether the practice of using helpers prevails. This is what the proposal was intended to determine, by counting the number of workers in a craft working on projects with helpers, and comparing that to the number of workers in the craft on projects without helpers.

Furthermore, the approach suggested by the BCTD is not feasible for several reasons. First, conducting the suggested area practice surveys to determine the specified helper duties in each locality would not be practical for the reasons of resource limitations noted earlier. Second, the approach is logically inconsistent. While in the first step the area practice survey would attempt to prescribe the precise prevailing craft content of the helper classification based on actual duties performed, in the second step nomenclature or job title alone would be the determining factor for whether to allow a helper classification. Third, such a practice, if feasible, would logically need to weigh helpers separately against *each* of these groups, with the result that no single job title would comprise a majority. And, fourth, such an approach would be a departure from established practices in DBRA administration which generally link all of the wages paid for

certain given work (with the exception of apprentices and trainees), irrespective of the name of the job used by individual contractors. (As noted above in the discussion regarding carpenters versus drywall hangers, ". . . wage rates for all those doing drywall work, *whether classified as carpenter or drywall hanger*, may be used in the usual way to compute the prevailing rate [for drywall *work*]." Manual, pp. 40-41, emphasis added.)

Finally, the concept of counting laborers against helpers to determine which prevails simply does not accomplish the intended purpose of allowing helpers to be utilized to assist journeymen where the practice of using them to perform craft work prevails. The question is not whether workers denominated as helpers prevail in relation to some other classification, such as laborers; the question is whether the practice of using helpers prevails, i.e., is it the predominant practice in the area to use helpers.

To determine whether the practice of using helpers prevails, the proposed statistical formulas in Options A and B utilize a representative weighting mechanism for determining the prevailing practice based on the actual number of workers employed on projects in a particular craft. The formulas link the number of helpers to the number of journeymen with whom the helpers are associated since, under the approved definition, a helper must work under the direction of, and be supervised by, the journeymen. Thus, the proposed formulas will determine if the prevailing *practice* on projects in an area is for helpers to work with and under the supervision of journeymen (according to the definition), by counting the number of workers on those projects who do the work in that craft.

Under the Option A formula, outlined above, where there is a "majority" rate, the practices regarding use of helpers of those contractors who paid the majority rate would prevail. For example, if the majority wage is a

collectively bargained wage rate, then the practices of union contractors would prevail, and helpers would not be permitted where they are not permitted under the applicable collective bargaining agreements. If the majority rate is a rate paid by open shop contractors, the open shop practice would prevail. If there is any question regarding whether the use of helpers prevails among contractors who paid the majority rate, then the method in the second step of Option A would be applied to those contractors who paid the majority rate to determine if the use of helpers prevails.

Where there is no "majority" journeyman rate and the weighted average rule controls, then it is likely that the projects surveyed will be predominantly open shop or a mixture of open shop and union projects. While extreme examples can be hypothesized under any decision rule, it is our view that, because of the widespread use of helpers among open shop contractors, it is highly unlikely that this decision rule would result in recognizing helpers as prevailing where they are only "identifiable". BLS data on employment levels within the various construction trade occupations indicated that, in 1984, in the industry as a whole (union and open shop sectors), 15 percent of the workers were helpers and 41 percent were journeymen, with the remainder representing other classifications including laborers (Preliminary Regulatory Impact Analysis, 52 FR 31369). The State of Wisconsin Department of Industry, Labor and Human Resources commented that current employment estimates in Wisconsin indicate that almost all open shop employers, and more than one-half of all unionized employers, utilize helpers in Wisconsin. ABC represented that almost 75 percent of all construction in the United States is performed today by the open shop sector, where a clearly widespread use of helpers exists. Furthermore, DOL's current operating procedures for determining if the survey data are adequate to sustain a calculation of the prevailing *wage* for a classification will

ensure that helpers are not recognized as prevailing where they are only "identifiable." (If the number of employees in a classification for whom survey wage data are obtained is limited, DOL will not issue a determination of the prevailing wage unless data on at least six workers is received from three or more contractors, none of which accounts for 60 percent or more of total reported employment, if the overall survey "usable response rate" is less than 50 percent. DB Wage Determinations Manual of Operations, pp. 61-63.)

On the other hand, we agree with some of the commenters' observation that Option B is more susceptible to the assertion that the rule could allow for the use of helpers where they are only "identifiable," since Option B counts workers in every case and gives no consideration to the practice in areas where union rates clearly dominate by the majority rule for the journeymen in the classification. Moreover, Option B could produce various anomalies in the wage determination process, such as a union-negotiated journeyman rate drawn from a collective bargaining agreement under which helpers are not allowed, coupled with an open shop helper at a wage level which bear no reasonable relationship to the journeyman rate; or a *semiskilled* helper wage rate lower than a union-negotiated wage rate for an *unskilled* laborer on the same wage determination.

Upon consideration of all the relevant comments submitted and the rulings of the courts in the litigation, DOL has determined that Option A should be adopted in lieu of all others for the following reasons. Where a majority of contractors in a geographic area is found to be paying a single rate for given work, the Davis-Bacon prevailing wage process should not alter that practice with respect to work covered by the law. Under well-established DBRA principles, wage determinations should reflect as accurately as possible what is actually being paid in the local area, to satisfy the statutory purpose of ensur-

ing that wages on federal construction projects "mirror" those that are locally prevailing (712 F.2d at 624). Option A will better achieve these results than Option B, by avoiding the potential disruptions of locally prevailing practices that could occur under the anomalies produced by Option B in the circumstances cited above. In those areas where union workers dominate with respect to a particular journeyman classification, Option A diminishes the likelihood of producing results found objectionable by the courts—namely, undercutting the prevailing wage rate by underclassification in union-dominated areas (712 F.2d at 624-626; 630). Since, as the court observed, wage rates and classification practices are two sides of the same coin and "must be fixed in tandem to ensure that a given wage is paid for given work" (712 F.2d at 628), if the prevailing wage rates for particular classifications in an area are derived from collective bargaining agreements, the prevailing wage process must ensure that the corresponding classifications of work to be observed under a DBRA wage determination are consistent with the job classifications upon which the prevailing wage rates were based. (*See, Fry Brothers Corp.*, WAB Case No. 76-6 (June 14, 1977).) Thus, in areas where union workers dominate with respect to a journeyman classification, and the union practice does not permit helpers, the methodology for finding if helpers prevail should not allow for the recognition of helpers in those areas. To quote in pertinent part from the Court of Appeals decision in *Building and Construction Trades Department, AFL-CIO v. Donovan*, 712 F.2d 611 (1983):

> To take a simplified example suppose that unions dominate the construction industry in a certain city and require that any worker using carpenters' tools be a journeyman carpenter or apprentice. Nevertheless, suppose that one or two nonunion firms in the city use lower paid carpenter's helpers to rough-cut beams. In that case, a federal project that permitted

workers who rough-cut beams to be termed "carpenter's helpers," because such a classification could be "identified" in the city, would not be paying the wage prevailing for the corresponding class of workers in that city. The prevailing wage for that kind of work would actually be the union wage of journeyman carpenters or apprentices. (712 F.2d at 624-625)

* * * *

We have concluded that the Secretary's identifiable-classification regulation would virtually ensure under-classification in union-dominated areas. At least where the Secretary has not found the use of helpers as provided for in the new rules to be a nearly universal practice. . . . he is barred from allowing work that is "prevailing categorized in one job classification to be placed in a lower paid classification merely because such a practice can be "identified" in the area. (712 F.2d at 625-626)

* * * *

the new regulation, as modified by the requirement that the classification prevail in an area before it may be used, is an entirely logical response to the problem of federal construction practice not reflecting the widespread, but not universal, practice of using helpers. The new regulation would lower the current federal wages for the most part in those *nonunion areas* where they are significantly above the wages paid in the area. . . . *In the union areas of the country where helpers are little used, they would not be allowed on federal projects. Thus, the new regulation would be narrowly aimed at correcting the federal practice in areas where it has not worked well, and would not result in a wholesale reduction in journeyman wages.* (712 F.2d at 630; emphasis added)

When there is no singular or majority wage rate (and corresponding practice) found prevailing in an area, the

second step, or weighted average rule, of Option A provides an appropriate mechanism for determining whether there is a prevailing practice of using a helper classification on projects by using a weighting factor that is based on the actual number of workers employed in a particular classification.

In addition to their arguments discussed at length above, the unions contend that Options A and B are defective in allowing helpers to prevail where they do not comprise the majority of workers in a classification. To support their views, the unions used the example in which helpers would be found to prevail although they constitute only 20 percent of the total workers in the classification. Again, it must be reiterated that the question is whether there is a prevailing practice of utilizing helpers, *not* whether they prevail in relation to journeymen or laborers or some other classification. For example, if contractors on every project in an area utilized helpers, the practice of utilizing helpers would be universal, even if many more journeymen than helpers were utilized. In fact, these regulations themselves would permit only two helpers to be employed for every three journeymen on Davis-Bacon projects. Under the unions' approach, the Department would be prohibited from finding that helpers prevail, even if an area where there is a universal practice to observe this ratio.

The ABC, on the other hand, suggested counting only the number of helpers, and not journeymen, and permitting helpers wherever there is a "substantial area practice." In our view this approach would be contrary to the Court of Appeals' requirement that helpers be found to prevail before they can be utilized on Davis-Bacon projects. ABC suggested as alternatives, Option C (count projects on which helpers are used) or Option E (count contractors employing helpers). These are not acceptable approaches, however, because they fail to give necessary weight to the size of a project or a contractor's workforce. Option D would weight projects by dollar volume,

a factor which is very difficult to determine and may bear little relationship to the size of the workforce. In our view, the number of workers actually employed in a craft is the appropriate weighting factor.

A number of commenters stated that there are other workers who perform similar duties to helpers on a project, and that they should be considered helpers in determining whether helpers prevail. As discussed above, it is our experience that laborers do not normally function as helpers and it is not our intention to upset established practices regarding the use of laborers. In addition, apprentices and trainees, since they are separately defined in the regulations, are not helpers. However, we have observed that use of other sub-journeymen classifications, such as "improvers" or "learners," sometimes is found in the union sector. Such workers will be counted as helpers in determining whether helpers prevail if they conform to the "helper" definition.

Finally, DOL has determined upon review that in order to obtain a more accurate assessment of total employment in a particular classification, it will be necessary to include, for counting purposes only, *all* workers who work in the classification, including apprentices and trainees. Accordingly, a clarifying revision is added to section 1.7 (d)(2) to provide that the total number of workers in the classification employed by contractors utilizing helpers (all journeymen, helpers, apprentices, and trainees) will be compared to the total number of workers in the classification employed by contractors not utilizing helpers (journeymen, plus apprentices and trainees, if any), and the practice covering the majority of the workers in such classification will determine whether to issue a helper rate. Since apprentices and trainees are defined separately in the regulations (29 CFR 5.2(n)(1) and (2)), and prevailing wage rates are not determined by DOL for apprentices and trainees (the contractor derives the rates required to be paid on DBRA work by applying the appro-

priate percentage progression in the approved training programs to the applicable wage determination rate for the journeyman), the wage rates paid to apprentices and trainees will not be included in determining the prevailing wage rate for the helper classification (just as the journeymen rates are similarly not so included). With the added clarification, Option A is adopted as proposed.

Issue: Conformance Procedures

Comments

The BCTD objected to the special criteria in proposed section 5.5(a)(1)(ii)(A) under which helper classifications and wage rates could be "conformed" (i.e., added to a wage determination after the wage determination has been issued) if a particular wage determination did not contain a helper classification. As proposed, this section provided, as did the rule promulgated in 1982, that helper rates could be conformed without regard to the longstanding requirement, applicable to all other conformance actions, that the work of a proposed classification to be conformed not be performed by another classification already listed in the wage determination. In addition, a provision was added as a result of the court of appeals decision to require that helper classifications may be conformed only where they prevail in the area covered by the wage determination. The BCTD argued that the first provision will permit conformance of less-than-prevailing classifications if a helper is allowed to perform work performed by another classification in the wage determination (i.e., the journeyman). Secondly, according to the BCTD, the proviso would grant authority to contracting officers to determine if a helper classification prevails in an area without reference to any guidelines or criteria for making such a determination. Under this scheme, the BCTD suggested that a contracting officer could undercut prevailing wage determinations issued by

DOL which, presumably, has already determined that use of the helper classification is not a prevailing practice in the area covered by the wage determination (otherwise DOL would have recognized the helper classification as prevailing in the first place and included it in the wage determination issued).

The AGC objected to the provision in the existing conformance procedures which requires that conformed wage rates bear a "reasonable relationship" to the wage rates contained in the wage determination. As applied to conformance of a proposed helper classification, this requirement may raise helper wage rates beyond what is actually paid. AGC suggested that since the helper classification is a low-skilled, entry-level position, helper wage rates are likely to be much lower and this should be recognized when helper wage rates are conformed.

Discussion

The conformance procedure is intended to provide a practical solution to the need for adding classifications and wage rates in cases where a published wage determination does not contain a particular classification that a contractor and the contracting agency find necessary to perform the government contract. The procedure provides for the Wage and Hour Administrator to review, approve, modify, or disapprove every proposed additional classification action.

The new helper definition contemplates that a helper's duties may overlap to some extent with the duties of journeymen. The conformance procedure, therefore, contains an exception from the normal rule for conformance of helpers, in order to permit adding a helper classification despite the fact that some of the duties to be performed by the helper may also be performed by journeymen in the classification. To do otherwise would mean a helper classification could never be conformed.

This provision will not permit conformance of less-than-prevailing helper classifications as alleged by the BCTD. One of the criteria for approval of helper conformances requires, as a prerequisite, that the helper classification prevail in the area where the work is performed.

The BCTD comment that the procedures grant new authority to contracting officers to enable them to undercut prevailing wage determinations issued by DOL is unfounded. The Wage-Hour Administrator must approve every proposed conformance action. The Administrator will be barred from approving a helper conformance if evidence is not submitted demonstrating that the helper classification prevails, taking into consideration the principles set forth in § 1.7.

The BCTD comment that any wage determination issued by DOL that does not contain a particular helper classification can be presumed to mean that the helper classification does not prevail oversimplifies the issues. Not all wage determinations are the result of extensive wage surveys, and not all counties are surveyed each year. A practical solution is needed for adding prevailing helper classifications to wage determinations, such as through conformance, for the areas that have not recently been surveyed at the time a request is made to add a helper classification to a wage determination. On the other hand, if a survey has recently been conducted and a determination made that helpers do not prevail, conformance of an additional helper classification will not be approved.

With respect to AGC's comments, prevailing pay relationships are generally found to be in direct proportion to the skill levels required and the difficulty of the duties peformed in the various classifications. The helper classification, as defined, is a *semiskilled* classification, as opposed to an *unskilled* classification or a *skilled* mechanic's classification. Thus, as a general statement, prevailing rates for *semiskilled* helpers would be expected in most

cases to be between the lowest rate listed on a wage determination for an *unskilled* laborer classification and the higher rate listed for the skilled journeyman mechanic in the classification which the helper is assisting. Absent a contrary prevailing area practice, it is not likely that we will find helper wage rates lower than rates prevailing in an area for unskilled work (with the exception of rare instances where the union laborer rate prevails in combination with open shop rates prevailing for the skilled trades). Therefore, the requirement that conformed wage rates bear a "reasonable relationship" to the wage rates contained in the wage determination should not, contrary to AGC's assertion, raise helper wage rates to levels above what is actually being paid to helpers in a community. In any event, the requirement that the rates bear a "reasonable relationship" has always been an integral part of the conformance process.

Accordingly, § 5.5(a)(1)(ii)(A) is adopted as proposed.

Issue: Ratio Limitation on the Use of Helpers: Variances.

The enjoined 1982 regulations contained a numerical limitation on the use of helpers: two helpers for every three journeymen, or not more than 40 percent of the total number of helpers and journeymen, in the contractor's work force on the job site. (A one-helper-to-five-journeymen ratio was originally proposed, but was raised to 2:3 in the final rule in response to public comments that 1:5 was too restrictive and would not reflect the actual number of helpers used in the industry.)

Helpers employed in excess of this ratio would be required to be paid the applicable journeyman's (or laborer's, where appropriate) wage rate for the work actually performed. To insure that this ratio did not disrupt existing established local practices in areas where DBRA wage determinations currently contain helper classifications without any limitation on the number permitted,

the preamble to the regulations provided that DOL would consider requests for variances from the ratio limitation prior to bid opening on a contract, if supported by a showing that the DBRA wage determination for the type of construction in effect in the area *before* the effective date of the final helper regulations contained a helper classification, and that there was a practice in the area of utilizing such helpers in that classification on DBRA projects in excess of the two-for-three ratio.

The ratio and variance provisions were not open for comment in the current rulemaking. Comments were previously invited on a proposed ratio in 1981, and a final ratio was adopted in 1982 after consideration of the public comments received. In the litigation, the district court enjoined the implementation of all the new regulations governing the use of helpers, including the ratio. However, the appeals court declined to rule on the helper provisions other than the expanded definition of duties and the provision that a helper classification need only be "identifiable" in an area to be used, on the grounds that the district court had not provided any significant discussion of the issues involved. Because the appeals court did not set aside the district court's injunction on the ratio, which had been enjoined as a part of the total helper package which was overturned, the district court's subsequent order, among other things, continued the injunction against the ratio.

The preamble to the 1987 Notice of Proposed Rulemaking (NPRM) included a discussion of the ratio and variance provision, and stated that the Department intended to implement them as final rules, as previously provided in the 1982 regulations, once the related helper provisions in the NPRM were finalized.

While several comments were submitted which took issue with either the mechanical operation of the ratio or variance provisions, and/or suggested the 2:3 ratio be

dropped or revised to other numerical limits (which were similar to the comments received during the 1981-1982 rulemaking), DOL cannot at this time implement any of the suggested changes without further notice-and-comment rulemaking. Accordingly, as explained in the preamble to the 1987 NPRM, the 2:3 ratio contained in the enjoined 1982 regulations is being implemented in this final rule. In addition, to assure that the ratio does not disrupt existing established local practices in areas where wage determinations currently contain helper classifications without restriction as to the number permitted, interested parties (which would include contracting agencies), may request, prior to bid opening on a contract, a variance from the ratio provision pursuant to section 5.14 of the regulations. Such variances will be considered for the applicable helper classification(s) upon a showing that the wage determination for the type of construction in effect in the area prior to the effective date of these regulations contains one or more helper classifications, and that there was a practice in the area of utilizing such helpers on Davis-Bacon projects in excess of a ratio of two to every three journeymen in the classification.

Issue: Use of wage data from projects covered by DBRA when determining whether helpers prevail.

Comments

AGC observed that under current policy and practices, projects covered by DBRA constitute most or all of the data base for surveys in heavy and highway construction. (Under 29 CFR 1.3(d)(1985), data from projects subject to DBRA are not used when determining prevailing wages for building or residential wage determinations, unless there is insufficient private construction from which to determine prevailing wages; data from DBRA projects are used in compiling wage rate data for heavy and highway wage determinations, because of the extensive public funds expended, and the limited privately-funded work,

in heavy and highway construction.) AGC postulated that if this practice were continued under the new rules for determining if helpers prevail, the prior restrictive helper policy on DBRA work would be perpetuated into future heavy and highway wage determinations. Similarly, where DBRA projects are included for building or residential wage determinations (due to insufficient data from private work), the same results would occur. AGC suggested that where DBRA projects are the source of wage and area practice data, helpers should be permitted for subsequent DBRA construction "where helper type of work has been found to prevail in a classification." However, AGC offered no insight on how that determination could be made.

Discussion

The regulation on use of DBRA projects in wage surveys was not open for comments during the current rulemaking. No valid approach has been suggested which would justify DOL using some separate data base for determining if helpers prevail that differs from the data sources used to establish the prevailing wages in an area. However, if future experience under the new helper rules indicates further rulemaking is needed to adapt the Act's implementation to changing prevailing area practices, DOL would not be precluded from considering further rulemaking initiatives.

Executive Order 12291; Regulatory Flexibility Act

Regulatory Impact and Flexibility Analyses

The Department prepared a preliminary regulatory impact and regulatory flexibility analysis in connection with the proposed helper regulations published on August 14, 1981 (46 FR 41444; 46 FR 41456). A final regulatory impact and regulatory flexibility analysis was prepared and summarized in the May 28, 1982 publication of the helper regulations (47 FR 23644; 47 FR 23658). The

Department updated its analysis of the helper provisions in connection with the proposed rule published on August 19, 1987 (52 FR 31368). The updated analysis estimated that the annual cost savings to be realized from implementing the helper regulations ranged from midpoint estimates of $422 million (helpers substitute for laborers and journeymen) to $610 million (helpers substitute for journeymen only), and projected that the changes would have a substantial beneficial impact on small contractors. Several comments were received regarding the analysis from individuals, labor organizations, contractors, and the Chief Counsel for Advocacy of the Small Business Administration. Some commenters stated their belief that the cost savings estimates were inflated while others suggested they were understated; some questioned whether the estimated savings would be passed through to the end user (owner or government); and others questioned various assumptions in the analysis regarding productivity and the disaggregated approach to the wage bill estimates. SBA's Chief Counsel for advocacy concurred with DOL's views that the regulations would have a significant beneficial impact on small businesses, and would also result in significant savings to the nation's taxpayers.

The Department, as set forth above in the discussion of comments received, has concluded that of the regulatory alternatives available, Option A is the most consistent with the stated objective of the statute.

However, the Department has concluded upon review that the references in the analysis to the effect that helpers may substitute for laborers are not correct. As noted above, laborers would not generally meet the definition for the helper classification. Further, under the Option A method for determining if the use of a helper classification prevails, prevailing pay relationships in the industry will make it highly unlikely that such a substitution effect could occur. For example, where the majority rate prevails for the journeyman and union rates are found prevailing in the area, the decision rule is not likely to pro-

duce a finding of prevailing helpers. Furthermore, it has been our experience in the open shop sector as well as in the union sector that prevailing pay relationships in the industry are found to be in direct proportion to skill levels, and semiskilled helper rates are above the unskilled laborer's rate. Thus, we anticipate that this will continue to be the case if there is no majority rate under Option A and the weighted average rule is utilized. As also noted above in the discussion of comments on the conformance procedures, the helper classification, as defined, is a semiskilled classification, as opposed to an unskilled laborer classification or a skilled mechanic's classification. Thus there will be no economic incentive for contractors to replace laborers with helpers. The economic incentive could only exist if the wage determination issued contained open shop rates for the journeyman and helper classifications, coupled with a union laborer rate that is higher than the helper rate. With rare exceptions, such a situation would not occur, since it is our experience that where there is an open shop journeyman rate it is almost never the case that there is a union laborers rate.

Accordingly, the Department is withdrawing the portion of the analysis which contains estimates of cost savings for where helpers substitute for both laborers and journeymen (Table II and the related discussion, 52 FR 31370). The Department is adopting the primary analysis published with the proposal as the Department's final regulatory impact analysis.

As indicated in the preliminary analysis, the results of the analysis represent the upper limit in potential cost savings from the proposed options. The analysis assumes the determination of whether helpers prevail is, in all cases, determined by the practice covering the majority of the workers reported in the survey (the second half of Option A), rather than the practice of particular contractors whose wage rates establish the prevailing wage (the first half of Option A). Data limitations prevented

estimation of the effects on construction cost savings when the practices of contractors whose wage rates establish prevailing wages also determine helper utilization. However, a review of prevailing wage determinations issued under DBRA indicates that roughly 35% of the general wage determinations issued and 20% of the individual project wage determinations issued contain rates based exclusively on collective bargaining agreements. To the extent that such collective bargaining agreements establish the prevailing wages under DBRA, and do not provide for the use of a helper classification, the estimate of cost savings would be reduced accordingly.

Copies of the complete analysis may be obtained from the Wage and Hour Division at the address and telephone number listed above under FOR FURTHER INFORMATION CONTACT.

Paperwork Reduction Act

The information collection requirements contained in section 5.5(a)(1)(ii) of Part 5 were previously approved by the Office of Management and Budget under the Paperwork Reduction Act and assigned OMB control number 1215-0140.

Conclusion

The Solicitor of Labor has determined, in accordance with Executive Order 12291, that this regulation is clearly within the authority delegated to the Secretary of Labor by the Davis-Bacon Act (40 U.S.C. 276a et seq.), Reorganization Plan No. 14 of 1950 (5 U.S.C. Appendix), and the Copeland Act (40 U.S.C. 278c) as well as 5 U.S.C. 301, 29 U.S.C. 259, and the laws listed in Appendix A of Part 1 and Section 5.1(a) of Part 5. The Solicitor, as set forth above in the discussion of the major issues, has determined that this regulation is consistent with the Congressional intent of the Davis-Bacon and related Acts

that wage determinations issued under those Acts reflect the rates prevailing on similar construction in the locality, that such wage determinations be incorporated in contracts subject to those Acts, and that contractors performing work on Federal and federally assisted construction projects subject to those Acts pay their workers at least the prevailing wages established by the Secretary of Labor in accordance with industry classification and wage practices.

Dates of Applicability

Certain provisions of this regulation are currently under injunction by the U.S. District Court for the District of Columbia. Accordingly, copies of this regulation are being submitted to the Court for review and approval prior to final implementation, pursuant to the Court's decision of December 21, 1984. Once the injunction is lifted, a notice will be published in the *Federal Register* providing an effective date 60 days thereafter. The provisions of the revised rule will then take effect as follows:

The revisions to section 1.7(d) of Part 1 shall be applicable only as to wage determinations issued based on wage surveys completed on or after the date of implementation of this revised rule.

The revisions to sections 5.2 and 5.5 of Part 5 shall be applicable only as to contracts entered into pursuant to invitations for bids issued or negotiations concluded on or after the date of implementation of this revised rule. None of the revisions herein shall be applicable to any contract entered into prior to such date.

This document was prepared under the direction and control of Paula V. Smith, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects

29 CFR Part 1

Administrative practice and procedures, Government contracts, Labor, Minimum wages, Wages.

29 CFR Part 5

Administrative practice and procedure, Government contracts, Investigations, Labor, Minimum wages, Penalties, Reporting and recordkeeping requirements, Wages.

Accordingly, 29 CFR Parts 1 and 5 are amended as set forth below.

Concurrent with the publication of this final rule, the final helper rules previously published in the *Federal Register* on May 28, 1982 (47 FR 23644; 23658) and subsequently deferred (*see* 47 FR 32070, July 26, 1982; 48 FR 19368, April 29, 1983) are hereby withdrawn.

Signed at Washington, DC, on this 24th day of January, 1989.

Dennis E. Whitfield,
Acting Secretary of Labor.

Alan C. MacMillan,
Acting Assistant Secretary for Employment Standards.

Paula V. Smith,
Wage and Hour Division.

PART 1—PROCEDURES FOR PREDETERMINATION OF WAGE RATES

1. The authority citation for Part 1 continues to read as follows:

> *Authority:* 5 U.S.C. 301; R.S. 161.64 Stat 1267; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 29 U.S.C. 259; 40 U.S.C. 276a-276a-7; 40

U.S.C. 276c; and the laws listed in Appendix A of this Part.

2. Section 1.7 is amended by adding a new paragraph (d) to read as follows:

§ 1.7 Scope of consideration.

* * * * *

(d) The use of "helpers", "apprentices" and "trainees" is permitted in accordance with Part 5 of this subtitle. Wage rates for semi-skilled classifications of helpers will be issued when the classifications are prevailing in the area. In determining whether use of a particular helper classification prevails in the area, the Administrator will follow the criteria set forth in paragraphs (d)(1) and (d)(2) of this section.

(1) If the prevailing wage for a particular journeyman classification is a wage that is paid to the majority of the journeymen in the classification as defined in § 1.2 (a)(1) of this part, then the practice followed by those contractors whose rates are adopted as prevailing for the journeyman shall also be deemed the prevailing practice in determining whether to issue a helper classification. Any ambiguity with regard to such practice, will be resolved by following the rule in paragraph (d)(2) of this section with respect to those contractors.

(2) If the prevailing wage for a particular journeyman classification is the average of the wages paid to the journeymen, weighted by the total number of journeymen in the classification as defined in § 1.2(a)(1) of this part, then the total number of workers in the classification employed by contractors utilizing helpers (journeymen plus apprentices, trainees, and helpers as defined in § 5.2(n)(4) of this chapter) on reported projects will be compared to the total number of workers in the classification employed by contractors not utilizing helpers (journeymen plus apprentices and trainees as defined in § 5.2(n)(4) of this

chapter), and the practice which covers the majority of such workers shall be deemed the prevailing practice in determining whether to issue a helper classification.

PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)

Subpart A—Davis Bacon and Related Acts Provisions and Procedures

3. The authority citation for Part 5 continues to read as follows:

> *Authority:* 40 U.S.C. 276a-276a-7; 40 U.S.C. 276c; 40 U.S.C. 327-332; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 5 U.S.C. 301; 29 U.S.C. 259; and the statutes listed in § 5.1(a) of this part.

4. Section 5.2 is amended by revising paragraph (n) introductory text and by adding paragraph (n)(4) to read as follows:

§ 5.2 Definitions.

* * * *

(n) The terms apprentice, trainee, and helper are defined as follows:

* * * *

(4) A "helper" is a semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and

holding materials or tools; and other related, semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice.

* * * *

5. Section 5.5 is amended by revising paragraph (a)(1)(ii)(A) and adding a new paragraph (a)(4)(iv), to read as follows:

§ 5.5 Contract provisions and related matters.

(a) * * *

(1) * * *

(ii)(A) The contracting officer shall require that any class of laborers or mechanics, including helpers which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefor only when the following criteria have been met:

(1) Except with respect to helpers as defined in 29 CFR 5.2(n)(4), the work to be performed by the classification requested is not performed by a classification in the wage determination; and

(2) The classification is utilized in the area by the construction industry; and

(3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination; and

(4) With respect to helpers as defined in 29 CFR 5.2(n)(4), such a classification prevails in the area in which the work is performed.

* * * *

(4) * * *

(iv) *Helpers.* Helpers will be permitted to work on a project if the helper classification is specified on an applicable wage determination or is approved pursuant to the conformance procedure set forth in § 5.5(a)(1)(ii). The allowable ratio of helpers to journeymen employed by the contractor or subcontractor on the job site shall not be greater than two helpers for every three journeymen (in other words, not more than 40 percent of the total number of journeymen and helpers in each contractor's or in each subcontractor's own work force employed on the job site). Any worker listed on a payroll at a helper wage rate, who is not a helper as defined in 29 CFR 5.2(n)(4), shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any helper performing work on the job site in excess of the ratio permitted shall be paid not less than the applicable journeyman's (or laborer's, where appropriate) wage rate on the wage determination for the work actually performed.

* * * *

[FR Doc. 89-1987 Filed 1-26-89; 8:45 am]

Editorial Note: This reprint incorporates a correction that is published in the *Federal Register* of Thursday, February 2, 1989.

APPENDIX J

FEDERAL REGISTER

Vol. 52, No. 160

Wednesday, August 19, 1987

DEPARTMENT OF LABOR

Employment Standards Administration, Wage and Hour Division

Office of the Secretary

29 CFR Parts 1 and 5

Procedures for Predetermination of Wage Rates; Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act)

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Proposed rule.

SUMMARY: This document is a proposal resulting from the Department of Labor's reexamination of revised regulations previously issued under the Davis-Bacon and Related Acts as required by an injunction and subsequent decision of the U.S. Court of Appeals for the District of Columbia Circuit.

The proposed rule contains provisions governing the use of semi-skilled "helpers" on federally financed and assisted construction contracts subject to the prevailing wage standards of the Davis-Bacon and Related Acts.

DATE: Comments are due October 19, 1987.

ADDRESS: Submit written comments (preferably in triplicate) to Paula V. Smith, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210. Any commenters desiring notification of receipt of comments should include a self-addressed, stamped post card.

FOR FURTHER INFORMATION CONTACT: Herbert J. Cohen, Deputy Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 390 Constitution Avenue, NW., Washington, DC 20210, Telephone: 262-523-8365.

SUPPLEMENTARY INFORMATION: On May 28, 1982, the Department published revised final Regulations, 29 CFR Part 1, Procedures for Predetermination of Wage Rates, and Regulations, 29 CFR Part 5, Subpart A—Davis-Bacon and Related Acts Provisions and Procedures (47 FR 23644 and 23658, respectively), containing, among other rules, new provisions intended to allow contractors to expand their use of semi-skilled helpers on Davis-Bacon projects at wages lower than those paid to skilled journeymen, wherever the helper classification, as defined in the regulations, was "identifiable" in the area. To protect against possible abuse, a provision was included limiting the number of helpers which could be used on a covered project to a maximum and two helpers for every three journeymen.

These regulations were challenged in a lawsuit brought by the Building and Construction Trades Department, AFL-CIO, and a number of individual unions. The U.S. District Court for the District of Columbia issued a permanent injunction on December 23, 1982 (*Building and Construction Trades Department, AFL-CIO, et al.*, v. *Donovan, et al.*, 553 F. Supp. 352) which, as modified by its order of January 17, 1983, enjoined the implementa-

tion of the following regulatory sections of the May 28, 1982 final rules pertaining to the use of helpers; 29 CFR 1.7(d); 29 CFR 5.2(n)(4); 29 CFR 5.5(a)(1)(ii)(A); and 29 CFR 5.5(a)(4)(iv). The Department appealed this injunction and deferred and enjoined provisions until further notice pending the outcome of the appeal (see 48 FR 19368; April 29, 1983).

On July 5, 1983, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision upholding the Department's authority to allow increased use of helpers, and approving the regulatory definition of a helper's duties. However, the court struck down the provision for issuing a helper wage rate where helpers were "identifiable" (29 CFR 1.7(d)), thereby requiring a modification to the regulations to provide that the helper classification be "prevailing" in the area before it may be used. The Court did not rule on the remaining helper provisions. *Building and Construction Trades Department, AFL-CIO, et al.*, v. *Donovan, et al.*, 712 F.2d 611.

On October 26, 1983, the AFL-CIO filed a petition for a writ of certiorari in the U.S. Supreme Court seeking review of the appeals court decision. On January 18, 1984, the U.S. Supreme Court denied the petition. 464 U.S. 1068. On December 21, 1964, the U.S. District Court for the District of Columbia issued an order which, *inter alia*, lifted the injunction on the definition of a helper in 29 CFR 5.2(n)(4), but continued the injunction with respect to the remaining helper provisions. The order stated the Department could submit to the Court reissued regulations governing the use of helpers, and that they would be approved if they conformed to the Court of Appeals decision.

The following is a description of the previously enjoined provisions which are now being reproposed with necessary revisions to conform them to the rulings of the courts in the litigation.

Part 1

Section 1.7(d) Scope of consideration.

This subsection provides that wage rates for semi-skilled classifications of helpers will be issued when they are "prevailing" in the area. The previous language that such classifications would be issued when "identifiable" in the area has been eliminated in accordance with the ruling of the appeals court. In addition, the Department is proposing, in the alternative, the following two approaches for determining whether there is a "prevailing" practice of using a helper classification.

Alternative Option A

If the prevailing journeyman wage for a classification is determined by the "majority rule" (29 CFR 1.2 (a)(1); i.e., more than 50% of the journeymen are paid the same wage), then the determination of whether use of a helper classification prevails will be made according to the practice of those contractors whose rates are adopted as prevailing for the journeymen. Thus, if a union wage for a particular classification prevails by the majority rule, the applicable union practice as to whether helpers are used would be followed (i.e., the use of a helper classification would be recognized as prevailing in such cases if the union practice is for a separate helper classification to be used; conversely, the use of a helper classification would not be recognized as prevailing if the union contractors do not use such a helper classification). Similarly, if an open shop rate prevails by the majority rule and the open shop contractors who paid such rate use a separate helper classification, the use of a helper classification would be recognized as prevailing for Davis-Bacon projects.

On the other hand, if the prevailing journeyman wage for a particular classification is determined by the "weighted average rule" (29 CFR 1.2(a)(1), i.e., the

average of the wages paid to the journeymen, weighted by the total of journeymen in the classification), then the total number of workers (i.e., journeymen plus helpers as defined in 29 CFR 5.2(n)(4)) in the classification employed by contractors using helpers on projects reported in the survey will be compared to the total number of workers in the classification employed by contractors not using helpers (journeymen only). The practice which covers the majority of the workers reported in the survey (i.e., the majority of workers associated either with, or without, the use of helpers) will determine whether a helper classification prevails.

For illustration, a survey discloses 150 journeymen carpenters working on projects where no carpenter helpers are employed and 80 journeymen carpenters working on projects where 30 carpenter helpers are employed. If the majority of such journeymen do not receive the same wage rate then the "weighted average rule" would apply. In this situation, helpers would not prevail since the majority of the workers in the craft in the survey, 150 journeymen employed on projects with no helpers compared to 110 (i.e., 80 journeymen plus 30 helpers) employed on projects with helpers, are employed by contractors not using helpers.

In contrast, if 50 carpenter helpers are employed with 100 journeymen carpenters on projects where helpers were utilized, compared to 100 journeymen carpenters employed on projects where no carpenter helpers were employed, under the "weighted average rule" helpers would be recognized as prevailing since the majority of workers in the craft, 150 (100 journeymen plus 50 helpers) out of 250, are employed by contractors who use helpers.

Alternative Option B

For each separate classification, compare the total number of workers (journeymen plus helpers, as defined) in the classification employed by contractors using help-

ers on projects reported in the survey to the total number of workers in the classification employed by contractors not using helpers (journeymen only). The practice which covers the majority of the workers reported in the survey will in all cases determine whether use of a helper classification prevails. (This approach, in essence, is the same as Option A when the "weighted average rule" determines the prevailing journeyman wage.)

Additional Options Considered

The Department is presently proposing to determine the "prevailing" use of a helper classification in one of the two manners described above, and seeks comments on each alternative. In addition, the Department has given careful consideration to several other alternatives and invites comments on the legal and practical feasibility of the alternatives set forth in (c) through (e) below.

Alternative Option C: Count by Number of Projects.

For each journeyman classification in which helpers were utilized, determine from the wage survey results the number of projects on which helpers worked in the particular classification and compare this number to the number of projects on which no helpers worked in that classification. The practice covering the majority of the projects would be considered prevailing.

Alternative Option D: Count by the Dollar Value of Construction Projects

For each journeyman classification in which helpers were utilized, determine from the wage survey results the total dollar value of the construction projects on which helpers were utilized in the particular classification and compare this amount to the total dollar value of the construction projects on which no helpers were used in that classification. The practice followed on the construction projects which comprise the larger dollar value would be considered prevailing.

Alternative Option E: Count by the Number of Contractors

For each journeyman classification in which helpers were utilized, determine from the wage survey results the number of contractors who used helpers in the particular classification and compare this number to the number of contractors who did not use helpers in that classification. The practice covering the majority of the contractors would be considered prevailing.

In order to assist the Department in establishing the most appropriate method for determining when the use of a helper classification is a prevailing practice on construction projects in an area, commenters are requested to provide specific information and supporting documentation which addresses, in detail, the practices in their local communities of using helpers (including estimates thereof) by craft classification (journeymen versus helpers), dollar volume, size and type (building, residential, heavy, or highway) of construction project, workforce size and type of construction contractor, and the presence or absence of collective bargaining agreements applicable to construction work performed in the area.

Part 5

Section 5.5(a)(1)(ii)(A) Conformance procedures.

This subsection provides that helper classifications (as defined in § 5.2(n)(4)) and rates can be conformed, without regard to whether the work of the helper classification is performed by another classification listed in the wage determination. As a result of the appeals court decision, the previously stayed provision has been revised to provide that helper classifications may be conformed only where they prevail in the area.

Regulatory Definition of Helper

The district court has lifted the injunction on the regulatory definition of the term helper which was published

on May 28, 1982 in 29 CFR 5.2(n)(4). Accordingly, no changes are being proposed in the helper definition. The Department intends to implement this definition when the remaining related provisions in this proposal are finalized. The definition is being repeated here for informational purposes.

Section 5.2 Definitions

* * * * *

(n) The terms apprentice, trainee, and helper are defined as follows:

* * * * *

(4) A "helper" is a semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and holding materials or tools; and other related, semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice.

* * * * *

In addition, § 5.5(a)(4)(iv) of the May 28, 1982 final rules provided conditions governing the use of helpers on Davis-Bacon covered projects, including a ratio which permitted employment of no more than two helpers for every three journeymen (or not more than 40 percent of the total number of helpers and journeymen) in the contractor's workforce on the project. No changes are being proposed in these provisions, which the Department also intends to implement in the final rulemaking.

As previously provided in the May 29, 1982 publication to assure that this ratio does not disrupt existing

established local practices in areas where wage determinations currently contain helper classifications without restriction as to the number permitted, it is proposed to allow interested parties (which would include contracting agencies), prior to bid opening on a contract, to request a variation from the ratio provision pursuant to § 5.14 of the regulations. Such variances would be considered for the applicable helper classification(s) upon a showing that the wage determination for the type of construction in effect in the area prior to the effective date of the final helper regulations contains one or more helper classifications, and that there was a prevailing practice in the area of utilizing such helpers on Davis-Bacon projects in excess of a ratio of two to every three journeymen in the classification.

Regulatory Impact and Flexibility Analyses

The Department prepared its preliminary regulatory impact and regulatory flexibility analysis in connection with the proposed helper regulations published on August 14, 1981 (46 FR 41444; 46 FR 41456). A final regulatory impact and regulatory flexibility analysis was prepared and summarized in the May 28, 1982 publication of the helper regulations (47 FR 23644; 47 FR 23658). As set forth in the final analysis, the annual cost savings to be realized from implementing the helper regulations were estimated to range from $246.43 million to $479.89 million, with the midpoint estimate of likely cost savings at approximately $363 million, and the changes were projected to have a substantial beneficial impact on small contractors. The Department has since updated its analysis of the helper provisions in connection with the proposed rule being published today, as set forth below.

The Cost Impact of the Increased Usage of Semi-Skilled Workers on Davis-Bacon Projects [1]

---

[1] This regulatory impact and flexibility analysis is based on the assumption that the revisions to §§ 5.2(n)(4) and 5.3(a)(4)(iv)

Introduction –

In order to quantify the cost savings that would result from an increase in the use of semi-skilled workers on projects covered by the Davis-Bacon and Related Acts (DBRA) as provided in this regulatory proposal, a disaggregated approach will be used. We will analyze the cost effects in each of four regions: The northeast, north central, west, and south. The aggregate annual cost savings will then be determined by computing the arithmetic sum of the regional cost savings estimates.

The disaggregated approach is used as a means of capturing some degree of the existing local differences in construction industry practices. This approach incorporates changes in the occupational mix on Davis-Bacon projects by region which would occur as a result of changes being made in the regulations, and the effects these changes have on the wage cost component of Davis-Bacon projects. Therefore, the aggregate cost estimates derived from this method will provide a more accurate picture of total wage cost savings than would cost estimates derived from a more highly aggregated analysis (i.e., one that relied solely on national data.)

Admittedly, a four region disaggregation does not approach the level of refinement to wage cost savings estimates that would result from the use of county-specific estimates; however, disaggregation to any significantly greater degree of detail as an attempt to measure cost effects in every locality is not possible due to data source limitations. In addition to this, the regions are defined to include selected metropolitan areas (in part, due to limitations of BLS data sources). This assumption is consistent with the view that most construction activity occurs in metropolitan areas. However, exclusion of wage rates in rural and less populated areas may cause our results to

---

of the regulations (which have been stayed pending approval of the U.S. District Court for the District of Columbia) will be implemented together with the revisions being proposed.

overestimate cost savings since wage rates in these areas are typically lower than in larger metropolitan areas.

As a final note, the primary analysis includes an important analytical assumption that helpers will only substitute for some portion of journeymen. Recognizing that the regulations may allow for the substitution of helpers for some laborers, as well as journeymen, we will include an additional range of cost estimates for cases where helpers substitute for some portion of workers in both classes. We also assume comparable productivity levels for helpers, journeymen, and laborers.

The 1984 Wage Bill for Helpers and Journeymen on Davis-Bacon Construction Projects

The initial step in the methodology is to determine the existing wage bill (i.e., labor cost) by region for all helpers and journeymen employed on Davis-Bacon projects. Once determined, the cost savings associated with the regulations can be derived by comparing these wage bills with regional wage bills that would result from increased helper usage on covered projects. Towards this end, we must first determine for each region, the size of the Davis-Bacon labor force, its occupational mix, and the average wage associated with each occupational classification.

Employment levels by craft classifications and region are derived from regional construction employment shares and national aggregate industry and craft employment levels obtained from Bureau of Labor Statistics (BLS) data sources.[2] The initial step is to determine the total helper-journeyman wage bill by region. This requires deriving the 1984 (the most recent year for which data for all variables are available) regional helper share of Davis-Bacon employment. (See tables in the appendix.)

[2] Supplemental to Employment Hours, and Earnings, States and Areas, 1965. USDOL/BLS; and Occupational Employment Statistics Survey of Selected Nonmanufacturing Industries, 1985. USDOL/BLS.

If we assume the value of construction to vary in like manner with construction employment, then based on our estimate that the share of DBRA construction is 18 percent of all new construction put into place, we assume that a corresponding share of all construction employment in each region works on covered projects.[3] This assumption is also used to derive the number of employees in the various craft classifications that are employed on covered projects.

Thus, in 1964 out of a total of 3,375,000 construction workers, we estimate that 607,500 were engaged in work on projects covered by the DBRA. BLS data on employment levels within various construction trade occupation indicate that if the occupational mix on Davis-Bacon projects mirrors the mix that exists in the economy as a

---

[3] We estimate all new public construction put into place in 1964, approximately $56 billion as reported in the U.S. Bureau of Census publication *Construction Reports*, to represent the share of all construction (18%) that is subject to DBRA. "All new construction put into place" includes renovations that cost $100,000 or more, rehabilitation projects that cost $500,000 or more, conversions, additions, improvements, remodeling, and replacement (e.g., heating systems, elevators). Using this as our estimate of construction covered by Davis-Bacon may cause a positive bias because it includes public construction projects funded exclusively by State and local governments that are therefore not covered by DBRA as well as federally assisted construction funded under statutes which do not require payment of Davis-Bacon wages. However, an opposing bias arises from the exclusion of small rehabilitation, repair, and renovation projects, and private projects that only indirectly receive federal assistance.

The alternative is to assume that only the value of the Federal share of all new construction put into place represents the covered universe. This would underestimate coverage since it also excludes small projects and projects to which Davis-Bacon is indirectly applied by virtue of statutes providing Federal assistance. Other estimates of Davis-Bacon covered construction include those of the GAO and OMB at $37.8 billion in 1979 and $30.0 billion for FY 1982 respectively. Their corresponding shares of all new construction put into place are 16 percent in 1979 and 13 percent for FY 1982.

whole, 248,798 (41 percent) of those working on Davis-Bacon projects will be journeymen, and 92,515 (15 percent) will be helpers (with the difference representing other workers in the construction industry such as truck drivers, draftsmen, laborers, etc.).

However, since the use of helpers under current regulations is limited to situations where the helper is a separate class of worker whose duties can be distinguished from the journeymen and the helper is not used as an informal apprentice or trainee, it is safe to assume that the helper share of employment on Davis-Bacon projects is substantially lower than that found in the industry. The helper share of total Davis-Bacon employment was determined to be 5.98 percent in the 1982 Final Regulatory Impact Analysis (FRIA).[4] We assume an identical share of helpers on covered projects in 1984 despite the decline in unionization in the construction industry. Our assumption is valid in view of the fact that the use of helpers is still greatly restricted by Davis-Bacon regulations. We assume that the regional helper shares of Davis-Bacon employment are also 5.98 percent due to current restrictions on helper usage.

The additional elements necessary for estimation of the wage bill on Davis-Bacon projects are the median weekly earnings data for journeymen and helpers. Unpublished data from BLS indicate that the seasonally adjusted median weekly earnings for journeymen and helpers are $377 and $216, respectively. These aggregate median weekly earnings for journeymen and helpers were adjusted to reflect regional differences in wage levels. Using this information, the 1984 wage bill for helpers and journeymen in each of the four regions can be determined.
Estimated Regional Wage Bills:

---

[4] *Final Regulatory impact and Regulatory Flexibility Analysis on Davis-Bacon Related Regulations, USDOA, 1982.*

	Billions
North East	$2.0
North Central	1.1
West	1.8
South	1.3

It is with these wage bills that alternative helper usage scenarios will be compared in order to determine the labor cost savings associated with increased usage of helper classifications on Davis-Bacon projects.

Methodology for the Determination of the Prevailing Practice

Detailed occupational employment data provide employment levels for various craft classifications of journeymen and helpers. If we assume that each helper in a particular craft works in association with one journeyman in the craft, then the number of helpers combined with the number of journeymen that work with helpers can be defined as the number of workers in that craft employed by contractors that use helpers. If we subtract this number from the total number of journeymen plus helpers in that craft, and identify the difference as the number of journeymen in that craft employed by contractors who do not use helpers, we can compare the two numbers to see which is larger, and therefore determine whether or not helpers prevail utilizing the proposed rule published herein.

We find that if one helper works in association with one journeyman, helpers will prevail in two thirds of the craft categories. Where helpers are found to prevail, the regulations would allow their usage on Davis-Bacon projects in a ratio not to exceed 2:3 (i.e., two helpers to three journeymen). Thus, if the maximum allowable number of helpers is used in each craft classification for which helpers are found to prevail, and helpers substitute only for journey-

men, the helper-journeyman wage bill on Davis-Bacon projects by region will be as follows:

	Billions
North East	$1.9
North Central	1.1
West	1.7
South	1.2
Total	5.9

The potential cost savings that result if the maximum number of helpers are used in two thirds of the craft classifications are $110 million in the north east, $94 million in the north central $142 million in the west, and $105 million in the south. (See Table I)

This method provides a low estimate because in determining whether helpers prevail, it does not take into consideration the use of helpers who work in association with more than one journeyman. For this scenario, we make the modest assumption that one helper in a particular craft works in association with two journeymen in the classification. In this case, the number of helpers combined with the number of journeymen that work with helpers can as before, be defined as the number of workers in that craft employed by contractors that use helpers. If we subtract this number from the total number of journeymen plus helpers in the craft and identify this difference as the number of journeymen in the craft employed by contractors who do not use helpers, we can compare the two numbers, determine which is larger and subsequently determine whether or not helpers prevail.

Our results indicate that if one helper works in association with two journeymen, helpers are found to prevail in all craft classifications. Once again, the regulations would allow helpers to be used in a ratio not to exceed 2:3. In this case, the regional Davis-Bacon helper-journeyman wage bills will be as follows:

	Billions
North East	$1.8
North Ceneral	1.0
West	1.6
South	1.2
Total	5.6

The potential cost savings that result if the maximum number of helpers are used in all craft classifications are $202 million in the north east, $157 million in the north central, $236 million in the west, and $175 million in the south.

This estimate is an upper limit. If helpers have been found to prevail their share of Davis-Bacon employment will be limited by their share of employment in a particular location. In addition, it is extremely unlikely that if individual county determinations were made, helpers would be found to prevail in all localities in all classifications. It is for this reason that we select $610 million, the midpoint of the high and low estimates as a more representative measure of the actual annual cost savings that will result from the increased usage of helpers on Davis-Bacon projects in all regions.

In sum, we fined that in each region, if one helper works in association with one journeyman, helpers prevail in two thirds of the craft classifications. If we assume that one helper works in association with two journeymen, helpers are found to prevail in all craft classifications. The estimated regional wage cost savings that result from the subsequent usage of helpers in a 2:3 ratio are summarized in Table I.

TABLE I.—REGIONAL COST SAVINGS
[In millions of dollars]

Region	Low [1]	High [2]	Mid-Point
North East	110	202	156
North Central	94	156	126
West	142	236	189
South	106	175	140
Regional Sum	451	769	610

[1] Helpers prevail in two thirds of the craft classifications.

[2] Helpers prevail in all of the craft classifications.

NOTE.—The aggregate annual cost savings derived here are $610 million. The 1982 FRIA estimated cost savings resulting from an increase in the number of helpers on Davis-Bacon covered contracts to be roughly $473 million. The difference between these estimates can be attributed to methodological differences. This analysis used a disaggregated approach and actual helpers employment data for eleven craft classifications. By contrast, the FRIA used a national aggregate approach and estimates of helper employment levels for most of the eleven craft classifications.

Substitution of Helpers for Both Journeymen and Laborers

The previous analysis assumed that helpers substituted for journeymen only. Principal substitution is likely to be for journeymen. However, there may be some degree of helper substitution for laborers. We therefore have done an additional analysis that assumes that where it has been determined that helpers prevail, helpers will substitute for laborers as well as journeymen. Based on regional employment and wage data derived from aggregate data available from BLS, we can make certain assumptions about the rate at which helpers will substitute for laborers and journeymen, and derive the associated cost savings. The regional cost savings will be lower than those derived based on the assumption that helpers sub-

stitute for journeymen only due to differences between wage costs of journeymen and laborers. Once helpers have been determined to prevail, if we assume that half of the allowable helpers will substitute for laborers and half for journeymen, the cost savings estimates are as provided in Table II. Alternatively, we assume that one third of the allowable helpers will substitute for laborers and two thirds for journeymen. These results are also in Table II.

TABLE II.—REGIONAL COST SAVINGS WHEN THERE IS SOME SUBSTITUTION OF HELPERS FOR BOTH JOURNEYMEN AND LABORERS

	Low [1]		High [2]	
Region	Half for journeymen and half for laborers	Two thirds for journeymen and one third for laborers	Half for journeymen and half for laborers	Two thirds for journeymen and one third for laborers
North East	77	88	140	161
North Central	65	74	108	124
West	98	112	163	287
South	72	83	121	139
Regional sum	312	357	532	611

[1] Helpers prevail in two thirds of the craft classifications.

[2] Helpers prevail in all of the craft classifications.

The results indicate that cost savings will indeed be smaller when helpers substitute for both journeymen and laborers. Assuming half the allowable helpers substitute for journeymen and half substitute for laborers, the midpoint of the estimated cost savings from both the high and low scenarios is $422 million. Alternatively, assuming that two thirds of the allowable helpers substitute for journeymen and one third substitute for laborers, the midpoint of the estimate cost savings from both the high and low scenarios is $484 million. By comparing this with our results from the scenario where helpers only

substitute for journeymen (where the midpoint of the estimated cost savings is $610 million), we see that cost savings are reduced when there is some degree of substitution for both journeymen and laborers.

The results of this analysis represent the upper limit in potential cost savings from the two proposed options. The analysis assumes the determination of whether helpers prevail is, in all cases, determined by the practice covering the majority of the workers reported in the survey, rather than the practice of particular contractors whose wage rates establish the prevailing wage. Data limitations prevented estimation of the effects on construction cost savings when the practices of contractors whose wage rates establish prevailing wages also determine helper utilization.

As indicated in the Department's previous analyses of the helper regulations, the cost savings set forth above will provide substantial benefits for smaller contractors who predominate in the industry.

APPENDIX

TABLE A1.—CONSTRUCTION EMPLOYMENT IN METROPOLITAN AREAS—1984
[in thousands]

Area	Employment [1]	Percent of total [2]
North East	327.5	32
Boston	48.7	
Nassau-Suffolk	45.3	
Newark	33.5	
New York	120.0	
Philadelphia	80.0	
North Central	179.8	17
Cleveland	27.6	
Detroit	41.4	
Chicago	110.6	
West	264.5	26
Los Angeles-Long Beach	106.0	
Denver	54.6	
San Francisco-Oakland	67.4	
Seattle-Everett	37.5	
South	264.6	26
Atlanta	56.1	
Baltimore	50.1	
Dallas-Fort Worth	105.9	
Miami	41.1	
Washington	11.4	
Total	1,036.5	

[1] Employment levels in all projects, private and Davis-Bacon.

[2] Percent of total employment in each of these four regions. (May not add to 100 due to rounding).

Source: Supplement to Employment, Hours, and Earnings, States and Areas, 1985, USDOL/BLS.

TABLE A2.—CONSTRUCTION TRADE EMPLOYMENT ON DAVIS-BACON PROJECTS—1984 [1]
[Actual employment levels]

Occupation	Employment
Journeymen	248,797
Bricklayers	15,858
Carpenters	78,044
Cement masons	15,694
Electricians	45,034
Painters	21,913
Pipefitters	391
Plumbers	36,317
Roofers	15,863
Sheet metal workers	10,651
Structural Ironworkers	9,032
Helpers	92,516
Bricklayers	12,393
Carpenters	27,821
Cement masons	6,998
Electricians	9,666
Painters	10,336
Pipefitters	4,664
Plumbers	8,608
Roofers	3,620
Sheet metal workers	1,256
Structural Ironworkers	2,011
Other helpers	3,143

[1] Davis-Bacon employment by craft classification is assumed to be 18 percent of total employment by craft classification.

Source: Derived from Occupational Employment Statistics Survey of Selected Nonmanufacturing Industries, 1985, USDOL/BLS.

TABLE A3.—REGIONAL CONSTRUCTION TRADE EMPLOYMENT ON DAVIS-BACON PROJECTS—1984 [1]
[Actual Employment levels]

Occupation	North East	North Central	West	South
Journeymen	79,613	42,295	64,685	64,685
Bricklayers	5,075	2,696	4,123	4,123
Carpenters	24,974	13,267	20,291	20,291
Cement Masons	5,022	2,668	4,080	4,080
Electricians	14,410	7,656	11,709	11,709
Painters	7,012	3,725	5,697	5,697
Pipefitters	125	66	102	102
Plumbers	11,621	6,174	9,442	9,442
Roofers	5,076	2,697	4,124	4,124
Sheet Metal Workers	3,406	1,811	2,769	2,769
Structural Ironworkers	2,890	1,535	2,348	2,348
Helpers	29,605	15,728	24,903	24,903
Bricklayers	3,966	2,107	3,222	3,222
Carpenters	8,906	4,730	7,233	7,233
Cement Masons	2,879	1,530	2,339	2,339
Electricians	3,093	1,643	2,513	2,513
Painters	3,306	1,757	2,687	2,687
Pipefitters	1,492	793	1,213	1,213
Plumbers	2,755	1,463	2,238	2,238
Roofers	1,158	615	941	941
Sheet Metal Workers	402	214	327	327
Structural Ironworkers	644	342	523	523
Other Helpers	2,051	1,090	1,667	1,667

[1] Regional employment levels are derived from the aggregate level by calculating regional shares of Davis-Bacon construction employment in each craft classification. Davis-Bacon employment is 18 percent of all construction employment.

Paperwork Reduction Act

The information collection requirements contained in § 5.5(a)(1)(ii) of Part 5 were previously approved by the Office of Management and Budget under the Paperwork Reduction Act and assigned OMB control number 1215-0140.

This document was prepared under the direction and control of Paula V. Smith, Administrator, Wage and

Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects

29 CFR Part 1

Administrative practice and procedures, Government contracts, Labor, Minimum wages, Wages.

29 CFR Part 5

Administrative practice and procedures, Government contracts, Investigations, Labor, Minimum wages, Penalties, Reporting and recordkeeping requirements, Wages.

Accordingly, 29 CFR Parts 1 and 5 are proposed to be amended as set forth below.

Signed at Washington, DC, on this 13th day of August 1987.

William E. Brock,
Secretary of Labor.

Fred W. Alvarez,
Assistant Secretary for Employment Standards.

Paula V. Smith,
Administrator, Wage and Hour Division.

PART 1—PROCEDURES FOR PREDETERMINATION OF WAGE RATES

1. The authority citation for Part 1 continues to read as follows:

Authority: 5 U.S.C. 301; R.S. 161.64 Stat 1267; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 29 U.S.C. 259.40 U.S.C. 276a-276a-7; 40 U.S.C. 276c; and the laws listed in Appendix A of this Part.

2. Section 1.7 is proposed to be amended by adding a new paragraph (d) to read as follows:

Proposed Option A

§ 17 Scope of consideration.

* * * * *

(d) The use of "helpers", "apprentices" and trainees" is permitted in accordance with Part 5 of this subtitle. Wage rates for semi-skilled classifications of helpers will be issued when the classifications are prevailing in the area. In determining whether use of a particular helper classification prevails in the area, the Administrator will follow the criteria set forth in paragraphs (d)(1) and (d)(2) of this section.

(1) If the prevailing wage for a particular journeyman classification is a wage that is paid to the majority of the journeymen in the classification as defined in § 1.2 (a)(1) of this part, then the practice followed by these contractors whose rates are adopted as prevailing for the journeyman shall also be deemed the prevailing practice in determining whether to issue a helper classification. Any ambiguity with regard to such practice, will be resolved by following the rule in paragraph (d)(2) of this section with respect to those contractors.

(2) If the prevailing wage for a particular journeyman classification is the average of the wages paid to the journeymen, weighted by the total number of journeymen in the classification as defined in § 1.2(a)(1) of this part, then the total number of workers in the classification employed by contractors utilizing helpers (journeymen plus helpers as defined in § 5.2(n)(4) of this chapter) on reported projects will be compared to the total number of workers in the classification employed by contractors not utilizing helpers (journeymen only), and the practice which covers the majority of such workers shall be deemed the prevailing practice in determining whether to issue a helper classification.

Proposed Option B

§ 1.7 Scope of consideration.

* * * * *

(d)(1) The use of "helpers", "apprentices" and "trainees" is permitted in accordance with Part 5 of this subtitle. Wage rates for semi-skilled classifications of helpers will be issued when the classifications are prevailing in the area. In determining whether use of a particular helper classification prevails in the area, the Administrator will follow the criteria set forth in paragraph (d)(2) of this section.

(2) The total number of workers in the particular classification employed by contractors utilizing helpers (journeymen plus helpers as defined in § 5.2(n)(4) of this chapter) on reported projects will be compared to the total number of workers in the classification employed by contractors not utilizing helpers (journeymen only), and the practice which covers the majority of such workers shall be deemed the prevailing practice in determining whether to issue a helper classification.

PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)

Subpart A—Davis-Bacon and Related Acts Provisions and Procedures

3. The authority citation for Part 5 continues to read as follows:

Authority: 40 U.S.C. 276a-276a-7; 40 U.S.C. 276c; 40 U.S.C. 327-332; Reorganization Plan No. 14 of 1950, 5

U.S.C. Appendix; 5 U.S.C. 301; 29 U.S.C. 259; and the statutes listed in § 5.1(a) of this part.

4. Section 5.5 is proposed to be amended by revising paragraph (a)(1)(ii)(A) to read as follows:

§ 5.5 Contract provisions and related matters.

(a) * * *

(1) * * *

(ii)(A) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefor only when the following criteria have been met:

(*1*) Except with respect to helpers as defined in 29 CFR 5.2(n)(4), the work to be performed by the classification requested is not performed by a classification in the wage determination; and

(*2*) The classification is utilized in the area by the construction industry; and

(*3*) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wages rates contained in the wage determination; and

(*4*) With respect to helpers as defined in 29 CFR 5.2(n)(4), such a classification prevails in the area in which the work is performed.

* * * * *

[FR Doc. 87-18853 Filed 8-18-87; 8:45 am]

APPENDIX K

FEDERAL REGISTER

Vol. 47, No. 104

Friday, May 28, 1982

DEPARTMENT OF LABOR

Wage and Hour Division, Employment Standards Administration

Office of the Secretary

29 CFR Part 1

Procedures for Predetermination of Wage Rates

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: This document provides the final text of regulations, 29 CFR Part 1, for the predetermination of prevailing wage rates under the Davis-Bacon and Related Acts. The method of determining prevailing wage rates has been revised and a provision for the issuance of semi-skilled classifications on wage determinations has been added.

DATES: Effective date: July 27, 1982. See Supplementary Information for dates of applicability.

FOR FURTHER INFORMATION CONTACT: William M. Otter, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210, Telephone: 202-523-8305.

SUPPLEMENTARY INFORMATION: On December 28, 1979, a proposal was published in the *Federal Register* (44 FR 77026) to make certain revisions to 29 CFR Part 1,

Procedures for Predetermination of Wage Rates under the Davis-Bacon and Related Acts. As stated in the proposal, its purpose was to reexamine and revise the procedures in Part 1 for predetermination of wage rates under the Davis-Bacon and Related Acts.

On January 16, 1981, this regulation was published in the *Federal Register* (46 FR 4306) as a final rule with a scheduled effective date of February 17, 1981. However, pursuant to the President's Memorandum of January 29, 1981, the Department published a notice in the *Federal Register* on February 6, 1981 (46 FR 11253), delaying implementation of this regulation until March 30, 1981. The Department subsequently delayed the implementation of this regulation until August 15, 1981, in order to permit reconsideration pursuant to Executive Order 12291. See 46 FR 18973 (March 27, 1981); 46 FR 23739 (April 28, 1981); 46 FR 33514 (June 30, 1961); and 46 FR 36140 (July 14, 1981).

On August 14, 1981, a new regulatory proposal developed in accordance with Executive Order 12291 was published in the *Federal Register* (46 FR 41444), and the previously published rule was further postponed until action could be taken on the new proposal. (See 46 FR 41043).

Interested persons were afforded the opportunity to submit comments to the Wage and Hour Division within 60 days after publication of the proposal in the *Federal Register*. Comments were received from approximately 2,200 interested parties, including Members of Congress, contracting agencies, contractor associations, contractors, labor organizations, State and local governmental agencies, business organizations, and individuals. Many comments were received either supporting or opposing the proposal in general. More than 1,000 comments (mostly from construction firms and associations) were directed solely to the issue of helpers in this proposal and a related proposal in 29 CFR Part 5.

Contractor associations and business organizations submitting comments included the Associated General Contractors of America (AGC), the Associated Builders and Contractors, Inc. (ABC), the National Association of Home Builders (NAHB), the Chamber of Commerce of the United States (C of C), the National Association of Manufacturers (NAM), the Business Roundtable, the National Federation of Independent Business (NFIB), the National Utility Contractors Association (NUCA), the Sheet Metal and Air Conditioning Contractors' National Association, Inc., the American Road and Transportation Builders Association, the National League of Cities (NLC), the National Association of Counties, the Council of State Housing Agencies, the National Sand and Gravel Association, and the National Ready Mixed Concrete Association. Labor organizations commenting on the proposal included the Building and Construction Trades Department of the AFL-CIO (BCTD), the Laborers' International Union of North America (LIUNA), the United Brotherhood of Carpenters and Joiners of America (UBC), the International Brotherhood of Electrical Workers (IBEW), the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry (UA), the International Brotherhood of Teamsters (Teamsters), the International Association of Bridge, Structural and Ornamental Iron Workers (Iron Workers), the International Union of Operating Engineers (IUOE), the United Automobile Workers of America (UAW), the Sheet Metal Workers' International Association (SMW), the Operative Plasterers' and Cement Masons' International Association (OPCM), and the International Brotherhood of Painters and Allied Trades (PAT). Among those Federal agencies submitting comments were the Department of Defense (DOD), the Department of Transportation (DOT), the Department of Energy (DOE), the National Aeronautics and Space Administration (NASA), the U.S. Postal Service (USPS), and the Small Business Administration (SBA).

Discussion of Major Comments

The following is an analysis of all the principal comments received and the corresponding changes, if any, made to the proposed rules. Each submission has been thoroughly reviewed, and each criticism and suggestion has been given careful consideration. For each section and, where appropriate, subsection of the final rule, the analysis contains a description of the major comments, the Department's conclusions regarding those comments, and the substantive changes herein adopted.

Section 1.2(a)—Definition of Prevailing Wage

Numerous comments favoring the proposal to eliminate the 30 percent rule were received from such parties as the AGC, NAM, NLC, USPS, local government agencies, contractors, and State contractor associations. These commentators stated that a rate based on 30 percent does not comport with the definition of "prevailing", and that the 30 percent rule gives undue weight to collectively bargained rates. Commentators also asserted that the 30 percent rule is inflationary because it sometimes results in wage determination rates higher than the average.

Other contractors and associations, while agreeing in principle with the proposal's elimination of the 30 percent rule, asserted that the proposed change in the definition of prevailing wages did not go far enough. Several commentators, including the ABC, NAHB, and the Council of State Housing Agencies, recommended that the weighted average rate be used in all cases. The C of C and some others recommended that the prevailing rate be determined either by eliminating the higher 50 percent of the wage rates paid in a locality and adopting the weighted average of the lower 50 percent of the wages paid, or by adopting the entire range of wage rates existing in a locality.

The BCTD, a few contractor associations, and some State labor departments commented in favor of retaining

the current 30 percent rule for determining prevailing wages. The major arguments made by these commentators were that the term "prevailing" contemplates the most frequently paid actual rate and thus, even the 30 percent rule unduly constricts the meaning of the statutory language; that an average rate is an artificially determined rate and therefore less consonant with the legislative intent than a rate which is actually paid; that the rule has been used by the Department since 1935 and was specifically endorsed by the House Special Subcommittee on Labor in 1962; and that elimination of the rule would disrupt labor relations and harm the competitive standing of unionized firms. The BCTD also asserted that any immediate wage savings would be more than offset by lower productivity, and thus, that overall construction costs would increase.

The Department agrees with the criticisms of the 30 percent rule. However, the Department has rejected the suggestion to define the prevailing wage as the weighted average in all cases because the term "prevailing" contemplates that wage determination rates mirror, to the extent possible, those rates actually paid in appropriate labor markets. In addition, the definitions of prevailing wage urged by the C of C are contrary to the prevailing wage concept embodied in the Davis-Bacon Act. Using the average of the lower 50 percent of wage rates paid would exclude the higher 50 percent of wages from consideration and, therefore, could not be considered the prevailing wage. Similarly, adopting the entire range of wages in the locality would permit contractors to pay the lowest wage that exists for a particular classification, rather than the "prevailing" rate.

Based on the comments and our analysis of the statute, we have concluded the term "prevailing wage" contemplates the most widely paid rate as a definition of first choice. The Department has accordingly determined that the revision which defines prevailing wage as the ma-

jority, or weighted average where there is no majority, is the most proper interpretation of the statute. Section 1.2(a) is therefore adopted as proposed.

Section 1.3—Wage Data Considered—Use of Wage Data From Projects Subject to Davis-Bacon

The preamble to the proposed solicited comments on whether projects subject to Davis-Bacon wage determinations should be excluded from the Department's wage surveys. Comments were specifically invited on the feasibility of differentiating Federal projects in wage surveys; the feasibility of determining prevailing wages for categories of construction which almost always involve Federal funding, if such projects are excluded; and the feasibility of differentiating projects where the contractor would otherwise have paid the wages contained in the wage determination.

Several commentators, including ABC, NAHB, NASA, and DOE, favored excluding Federal projects from wage surveys in all cases, although they did not comment specifically on the feasibility of such an exclusion. These commentators asserted that the Act was intended to require contractors to pay, at a minimum, those rates found to be prevailing on *private* construction projects in the area in which the federal work is to be performed. These construction projects subject to the Act in surveys skews the survey results upward. DOT commented that it saw no problem in excluding wages paid on Federal projects from surveys. It recommended that such data be excluded except in cases where there is not a sufficient sample of privately financed construction to establish a wage rate.

The BCTD, most building trades unions, the Teamsters, the United Auto Workers, the Minnesota Building and Construction Trades Department, the North Carolina and Iowa Departments of Transportation, the Texas Highway Department, the Texas Heavy-Highway Branch of AGC,

and the Colorado Contractors Association opposed the exclusion of Federal wage data. Many of the union commentators asserted that the Act's legislative history shows no Congressional intent to restrict wage surveys to privately financed projects, and that the 1935 amendments extending the Act's coverage to public works implied that Federal projects would be surveyed since the Act requires payment of wages prevailing on projects "of a character similar", and there are few projects of a character similar to public works which are not federally financed.

Most commentators in opposition to the exclusion claimed that, as a practical matter, it would be administratively difficult or even impossible to establish wage determination rates for several types of construction projects that are always or nearly always federally financed, such as highways, bridges, dams, and sewage treatment plants, and for certain craft classifications in rural areas. The MBCTD claimed that it would also be administratively difficult and costly to determine whether a given wage rate would have been paid absent a wage determination, noting that the State of Minnesota had attempted to make such a differentiation in its wage surveys but was unable to do so.

The Department has concluded that, where practicable, it would be appropriate to exclude wage data from Davis-Bacon projects in determining prevailing wages. The Department also believes this result is in accordance with the statutory purpose. Accordingly, § 1.3 has been revised to provide that wages paid on projects subject to the Davis-Bacon Act will not be considered in developing wage determinations for "building" and "residential" projects unless the Department finds that there is not sufficient data from privately financed construction projects of a similar character to determine prevailing wages. We have also concluded that it would not be practical to determine prevailing wages for "heavy" and "highway" construction projects if Davis-Bacon covered projects are excluded in

making wage surveys because such a large portion of those types of construction receive Federal financing. The regulation therefore permits the use of such data on these types of projects.

Section 1.6(a)(1)—Expiration Date of Project Wage Determinations

Several commentators, including ABC, AGC, and some State contractor associations, commented in favor of the proposal to extend the expiration date of project wage determinations from 120 days to 180 days.

The BCTD, the Teamsters, the UAW, and others opposed this proposed change, claiming that extending the duration of project determinations will increase the likelihood that rates contained in wage determinations will be out of date before the start of construction.

Extending the life of project wage determinations to 180 days will reduce the need for recompetition and other procurement delays caused by the expiration of such determinations after bid opening. Also, as a practical matter, it is the Department's experience that most such determinations are used within a shorter period of time. Accordingly, this proposal is deemed reasonable and is adopted.

Section 1.6(b) and Appendix C

Several State chapters of AGC objected to the categorization of construction in proposed Appendix C (which embodies the substance of All Agency Memoranda Nos. 130 and 131) on the ground that it would amount to an imposition of standards that are nationwide in scope ignoring local area construction practices. A few contractor associations stated that the categories of construction overlapped. Some associations disagreed with the proposed categorization of certain types of work. Contractor groups also suggested that the regulations require

agencies to state specifically in the contract which schedule of wage rates is applicable.

The Department has reconsidered the advisability of including in the regulations the specific guidelines of All Agency Memoranda Nos. 130 and 131. It has concluded that the best interests of all concerned parties would be more fully served by retaining the Memoranda as guidelines rather than as regulations. However, in the near future the Department will amend the guidelines and issue a new memorandum to all federal agencies to insure that local practices will be the primary consideration in resolving disputes in this area. The Department will also publish this new memorandum as a notice to the public in the *Federal Register*.

Section 1.6(b) has also been amended to clarify that contracting agencies are responsible for identifying as specifically as possible the appropriate schedule(s) to be applied to a contract.

Accordingly, Appendix C is deleted from the regulations.

Section 1.6(c)—"10-Day Rule"; "90-Day Rule"

Several commentators, including ABC, NASA, DOE and some State highway agencies, objected to the proposed revisions of the "10-day rule" which would (1) require contracting agencies to accept modifications to wage determinations received less than 10 days before the opening of bids unless the agency finds there is not sufficient time to notify bidders of the modification, and (2) also require the agency to insert a report of such finding in the contract file, and make it available to the Administrator upon request. Most of these commentators recommended that the current "10-day rule" (which requires agencies to use modifications received less than 10 days before bid opening only if it is found that there is sufficient time to notify bidders) be retained, while others recommended that a 20-, 25-, or 30-day rule be adopted.

DOL's policy has been that bid solicitations should contain the most recently issued determination of current prevailing wages which can be included without causing undue disruption of the procurement process. However, in the past, many contracting agencies have declined to use wage modifications received less than 10 days before bid opening, even though there may have been more than sufficient time to notify bidders of the modification prior to bid opening.

The courts have held that the current "10-day rule" imposes an affirmative obligation on the contracting agencies to make a substantive determination as to whether there is sufficient time to notify bidders of modifications received less than 10 days before bid opening. (*Operating Engineers, Local 627* v. *Arthurs*, 355 Supp. 7 (W.D. Okla.), *Aff'd*, 480 F.2d 603 (10th Cir. 1973).) In view of this obligation and the Department's experience that the agencies often misunderstand that obligation to make such a determination, it was decided that the Act could be better implemented by adopting the proposed revision. DOL also believes that the notification process can be completed in most cases without undue disruption of the procurement process or inflation of bid prices. Of course, it is recognized that there may be cases where an agency will find that it is not feasible to adopt modifications less than 10 days before bid opening. In such cases, the agency would simply be required to document its finding of insufficient time prior to bid opening and incorporate this finding in the contract file. While we have considered the objections to this reporting requirement, we find that written documentation of the agency's finding of insufficient time is in accord with sound administrative practices and does not impose an undue paperwork burden upon the agency.

ABC objected to the "90-day rule", which provides that if a contract to which a general wage determination has been applied has not been awarded within 90 days after

bid opening, any modification published prior to contract award would be effective unless the agency has obtained an extension of the 90-day period from the Administrator. ABC asserted that the proposed rule would be disruptive to the procurement process and is beyond DOL authority.

The Department's obligation to insure that the most current determination of prevailing wages is included in contracts subject to the DBA is frustrated by lengthy delays which occur between bid opening and contract award. Further, the regulation permits the agency to request an extension of the 90-day period in cases of undue hardship. Therefore, we believe the "90-day rule" is appropriate.

Since it is the Department's experience that projects assisted under the National Housing Act and section 8 of the U.S. Housing Act of 1937 are not generally competitively bid and since it therefore would be confusing to suggest that the 10-day rule could apply to such projects, the Department has determined upon review that the references to competitive bidding should be deleted from the pertinent paragraphs in § 1.6(c). No other changes are being made in this section.

Section 1.6(e) and (f)—Incorporation of Wage Determinations and Modifications After Contract Award

A few commentators questioned DOL's authority to require the incorporation of a new wage determination in a contract any time before award (or in some cases, after award) when the agency fails to include any wage determination in a covered contract, or has used an inapplicable wage determination or one that contains substantial errors. DOT, DOE, and NASA asserted that the contracting agency, not DOL, has authority to make determinations of coverage under the Davis-Bacon Act. ABC commented that the provisions in question are disruptive, and that the regulations should contain more

specific criteria regarding the circumstances in which DOL would exercise its authority to incorporate new wage determinations.

The BCTD, several building trades unions, the Teamsters, and the UAW objected to the provision in § 1.6(f) that corrective action to include the proper wage determination after contract award would occur only if the contractor is compensated, in accordance with applicable procurement law, for any increase in wages resulting from such action, asserting that the agencies could use this provision to resist post-award amendment of any contract which contains an invalid wage determination.

Since the Davis-Bacon Act requires that all covered contracts contain an applicable wage determination, DOL must provide some mechanism for the incorporation of proper wage determinations in covered contracts after contract award. The Department's authority in this regard, including the authority to determine questions of coverage under the Act, is derived from the Act as well as from Reorganization Plan 14 of 1950.

With respect to the ABC comment, the Department agrees that the provision in § 1.6(e)(2) permitting withdrawal of wage determinations containing "substantial errors" without regard to the 10-day rule is not sufficiently specific. Accordingly, § 1.6(e)(2) is revised to permit such withdrawals only as a result of a decision by the Wage Appeals Board.

As to the comments from labor organizations, we believe it would be inequitable to require corrective action after contract award if the contractor would be financially harmed in rectifying a Government error. Nor should contracting agencies be placed in the position of contravening procurement law. The regulation contemplates that the agencies will find a method to incorporate a proper wage determination in a contract and compensate a contractor, where appropriate, which is in accord

with procurement law. Accordingly, no changes are made in § 1.6(i).

Section 1.7(b)—Scope of Consideration

Numerous commentators, including AGC, ABC, NLC, NAHB, State contractor associations, and individual contractors, agreed with the proposal to prohibit the use of wage survey data obtained from a metropolitan area in issuing a wage determination for a rural area, and vice versa. Their rationale was that this provision would prevent the "importation" of generally higher metropolitan wages into lower paid rural areas. NUCA commented that in the past, such importation has disrupted labor relations in rural areas, because employees who received high wages on a Davis-Bacon project were unwilling to return to their usual pay scales after the project was completed.

The BCTD and many individual building trades unions opposed the blanket prohibition. Several of these commentators stated that there is a need to retain flexibility in certain cases when wage data are unavailable in the rural area where the work will be performed, and that "importing" rates from nearby metropolitan areas in such cases is justified because workers from metropolitan areas often perform the work due to a shortage of skilled labor in the vicinity of the project.

Several commentators, including the AGC and some of its local chapters, noted that the definition of "area" in § 1.2(b) of this part includes political subdivisions smaller than the county, and claimed that our reliance in § 7.1(a) on the county as the normal survey area is not consistent with the intent of the Davis-Bacon Act. They suggested that DOL consider smaller local civil subdivisions within the county as the basis for making wage determinations. Other commentators, including the Texas Highway Department, the Texas Heavy-Highway Branch of AGC, and the Carolinas Branch of AGC, urged the Department to

expand the area of consideration to the Standard Metropolitan Statistical Area or some other larger area, in cases where the same wage pattern exists throughout the area.

The Department has determined that its past practice of allowing the use of wage data from metropolitan areas in situations where sufficient data does not exist within the area of a rural project is inappropriate. Therefore, the prohibition proposed against this practice is adopted.

In response to the union comments, the Department notes that if sufficient data is not available from contiguous rural counties, it would be obtained from other rural counties in the State, and if, as these comments suggested, large numbers of workers from metropolitan areas typically work at higher metropolitan wage rates on projects in rural areas, those higher wages would be found and receive proper weight in surveys of wages paid in such areas.

With respect to comments on the size of the survey area, experience has demonstrated that the standard, but not inflexible, practice of using the county as the area of consideration is the most administratively feasible approach to collecting meaningful data. In our view, this practice is in accord with the Act. In answer to the commentators who suggested that we recognize areas larger than one county, where a survey reflects that the same rate in fact prevails in several contiguous counties within a State, a single wage determination may be used for the entire area.

Section 1.7(d)—Helpers

A very large number of commentators, particularly various contractor associations such as ABC and AGC and their affiliates, the NAM, NAHB, the Business Roundtable, the C of C, and numerous individual non-union contractors, generally favored the proposal to in-

crease recognition of helper classifications. They noted that the proposal reflects the construction industry's actual practice on private projects, and they stated that adoption of the proposal would result in increased job opportunities for youth, women, and minorities.

The building trades unions and some State and local governmental agencies opposed increased recognition of helpers on the grounds that this would undermine formally established apprentice and trainee programs to the determent of minorities and unskilled workers. In their view, it would also lead to shortages of qualified journeymen. Most union groups felt the proposal was contrary to the statute because it allows the use of helpers without a finding that such a classification practice prevails in the area.

The Department currently recognizes a helper classification only where it is a separate and distinct class of workers which prevails in the area, and where the helpers' scope of duties can be differentiated from those of journeymen. The Department has concluded this restrictive approach is inappropriate. Increased recognition of helpers will reflect the widespread industry practice of employing semi-skilled workers on construction projects, including both helpers working in a particular craft and cross-craft or general utility helpers. This will not only result in considerable cost savings to the Government but will result in more job opportunities for unskilled and semi-skilled workers (including youth, women, and minorities) and encourage their use in a manner which provides training. It will enhance productivity by allowing such workers to do tasks requiring more limited skills, thus allowing higher skilled workers to use their skills more effectively. It will also enable more contractors to compete for Government work. (See also the related changes proposed to 29 CFR Part 5 regarding the allowable use of helpers and the discussion of comments received thereon.)

Accordingly, § 1.7(d) is adopted with clarifying changes.

In addition to the above, minor editorial and language changes have been made in some sections.

Classification

This rule would not appear to require a regulatory impact analysis under Executive Order 12291 since the changes will result in substantial cost savings annually for both contractors and the Government while still assuring protection of local labor standards. However, because of the importance to the Government and the public of the issues involved, the Department has concluded that the regulation should be deemed a "major rule" for purposes of the Executive Order. It has been determined, in accordance with Executive Order 12291, that these changes are the most cost-effective regulatory alternatives consistent with the purpose of the statute.

Summary of Final Regulatory Impact and Regulatory Flexibility Analysis

The Department has prepared its final regulatory impact analysis to identify and quantify the cost impact of the final Davis-Bacon regulations and various alternatives that were explored and to inform the public of the economic considerations behind these final revisions in accordance with Executive Order 12291.

The final analysis builds upon a preliminary regulatory impact analysis (PRIA) which accompanied the proposed revisions published on August 14, 1981 (46 FR 41444). The PRIA estimated that the proposed changes would result in substantial cost savings amounting to at least $670 million annually to both contractors and procuring agencies, while still assuring protection of local wage rates and practices. The Department requested comments and additional information on all economic assumptions

used in the analysis, as well as any alternative suggestions designed to achieve the objectives of the Davis-Bacon and Related Acts at lower costs. The Department received numerous comments on the PRIA estimates and its economic assumptions. The Department has carefully reviewed all of these comments in finalizing the regulations and has incorporated these considerations, as appropriate, into the final regulatory impact analysis (FRIA).

The final rule must also consider the Regulatory Flexibility Act of 1980. This Act requires agencies to prepare regulatory flexibility analyses and to develop flexible alternatives whenever possible in drafting regulations that will have "a significant economic impact on a substantial number of small entities." The analysis summarized below meets the requirements set forth for assessing the economic impact of the final changes in the Davis-Bacon regulations on small entities as required under the Regulatory Flexibility Act.

A. Definition of "Prevailing" Rate

The existing regulations define the "prevailing" rate as the rate paid to the majority of the employees in a classification; or if there is no majority, the rate paid to the greatest number, provided it constitutes at least *30 percent* of the employees in the classification; or if no single rate is paid to at least 30 percent of the employees, the *weighted average* rate.

The proposed regulation re-defined the "prevailing" rate as the single rate paid to a majority of workers in a particular classification on similar construction in the locality, or the weighted average rate if no single rate is paid to a majority. The PRIA estimated that elimination of the "30 percent" rule would result in substantial cost savings on Federal and federally assisted construction contracts amounting to at least 120 million in Fiscal Year 1982 alone.

Many commentators on the preliminary analysis argued that the $120 million estimate of cost savings was too high. Construction unions generally faulted the analysis for ignoring the productivity differences between workers and for implicitly assuming that all workers on covered construction projects earn the prevailing (Davis-Bacon) rate. The Building and Construction Trades Department (BCTD) placed the maximum cost savings at $45 million annually and advocated retention of the current definition. In contrast, most contractor associations (which generally advocated greater revision of the definition) argued that few cost savings would result from the proposal because the wages of many workers are fixed by collective bargaining agreements. These groups offered alternative estimates ranging from no cost savings to $50 million.

While acknowledging the validity of several of these criticisms, it remains our position that the $120 million estimate represents a "best guess" of the likely cost savings. Many of the alternative estimates were based on an inaccurate reading of our methodology, which in fact took into account that few cost savings would result in highly unionized urban areas. In other cases, the direction of the bias asserted to exist in our PRIA by the comments was unclear, rather than working to inflate the cost savings. Moreover, the commentators ignored significant negative biases which would raise the cost savings, such as the bias resulting from the lack of construction wage data for small cities. All of the limitations associated with our methodology are clearly spelled out in the analysis.

After careful review of all the evidence, the Department has adopted the proposed definition not only because it will result in substantial budgetary savings, but also because it is most consistent with the "prevailing wage" concept contemplated in the legislation, under which rates are designed to mirror, to the extent possible, those customarily paid in appropriate labor markets.

The Department also considered defining the "prevailing" rate as the average in all cases as proposed by the Associated Builders and Contractors Inc. (ABC). This alternative was not selected because the term "prevailing" contemplates the most widely paid rate as a definition of first choice.

Several other alternatives were also considered including (1) setting wage determinations at the average of rates in the lower half of wage distributions for crafts in a locality (as proposed by the United States Chamber of Commerce); (2) issuing wage determinations as a range of wage rates reflecting the actual distribution of wages in a locality (also proposed by the United States Chamber of Commerce); and (3) allowing procurement agencies to set aside rates based on, rather than identical to, DOL determinations (the "decoupling" approach). The Department has carefully considered these options, but concluded that they would not be consistent with the statute's intent.

The DOL methodology which is the basis for the $120 million estimate of cost savings calculates the change in wage costs under different decision rules by comparing a large sample of 1,170 Davis-Bacon craft determinations in effect in 1981 with average wage rates for those crafts and localities derived from field surveys conducted by the Employment Standards Administration (ESA). Our sample covered nine crafts and three types of construction (i.e., building, highway and heavy and residential) across all regions of the country.

Because we know the decision rule actually used in setting each Davis-Bacon determination in the sample and the wage rates paid workers in geographic areas, the impact on Davis-Bacon rates of any change in administrative procedures can be readily determined. For example, to evaluate the percentage change expected in Davis-Bacon rates associated with dropping the 30 percent rule,

all determinations in the sample based on this rule were compared with their corresponding average rates to calculate the percent differences in the Davis-Bacon rates. For those determinations based on the majority or average rule, the percent differences were set at zero.

However, many Davis-Bacon determinations are not based on comprehensive wage surveys but rather on collective bargaining agreements or state surveys. Hence, results based solely on the sample will be biased if there is a higher frequency of determinations based on the 30 percent rule in non-surveyed areas. Clearly, average rates cannot be issued without a wage survey; hence, it is likely that Davis-Bacon determinations are implicitly based more frequently on the 30 percent rule in non-surveyed areas.

To adjust our estimates for this possible sample bias, we used both survey data and independent sources to construct estimates of percent differences for all areas lacking surveys. For example, in large urban areas where wage determinations are based on collective bargaining agreements, information on the percentage of workers who are unionized in the area was used to determine the impact of using the majority rule or the average. Where the extent of unionization was sufficiently high, current rates could be expected to prevail even in the absence of the 30 percent rule. We, therefore, assumed that there would be no change in Davis-Bacon rates. Otherwise, we used estimates of percent changes from Davis-Bacon rates to average rates derived from a CEA study of less unionized urban areas.

With estimates in hand for each county, we then summed the percentage differences for each type of construction across all geographic areas (both rural and urban) based on their relative contribution to total public construction activity. This resulted in three separate estimates of the expected percentage change in Davis-Bacon

wage rates from adopting different administrative procedures, one for each construction sector.

The final step involves matching these percent changes in wages to estimates of the total labor costs expected to be covered by Davis-Bacon in Fiscal Year 1982 for each type of construction. We then added up the separate labor cost savings estimates for each construction sector to form our final estimate of the aggregate wage cost savings from alternative wage determination rules. The final regulatory impact analysis describes the methodology in further detail.

This methodology was used to estimate the cost impact of dropping the 30 percent rule and of using the average rule in all cases. This procedure produced cost savings ranging from $68 million to $173 million from eliminating the 30 percent rule. The average cost savings in this range is around $120 million. The corresponding estimates of cost savings from switching to an average rule in all cases range from $127 milllion to $288 million, with average cost savings set at $210 million.

This methodology could not be applied to estimate the cost impact of most other alternatives under consideration because of the absence of independent data on which to calculate the differences in wages resulting from these other options for non-surveyed areas. Also, and perhaps more importantly, this methodology measures only the changes in Davis-Bacon rates, not actual changes in wage rates paid on Davis-Bacon projects. The further one moves the Davis-Bacon minimum below the average, the less reflective it is of actual prevailing wages and hence of the real cost savings to be anticipated.

Although the Department concluded that such an approach would be inconsistent with the statute's intent, we developed a crude estimate of the potential cost savings from the alternative calling for a range of wages rather than a single rate for each determination in a locality, using our methodology and the results of a CEA study

which estimated the net impact of setting minimum wages on Davis-Bacon projects. This estimate is similar to the alternative that establishes a range of wage rates, since the lowest rate in the range effectively becomes the Davis-Bacon minimum. This procedure produced cost savings estimates ranging from $505.3 million to $631 million with a midpoint estimate of $568.2 million for this option.

Much of these cost savings would be passed on to small contractors. The Census Bureau's Economic Census of Construction shows that in 1977 there were 53,665 construction establishments with fewer than 20 employees involved in construction work. These small contractors accounted for about 56 percent of all such construction establishments, but only about 17 percent of employment. While we could use relative employment percentages to distribute the total cost savings from adopting alternative wage determination procedures among large and small contractors, this would be inappropriate since smaller contractors are more likely to pay wages normally below Davis-Bacon rates, resulting in relatively larger cost savings for small contractors from any lowering in Davis-Bacon rates. Although we can not develop numerical cost estimates, the cost savings would be expected to be substantial.

While our approach provides a reasonable approximation of the wage cost savings expected to result from the final regulation, it should be stressed that they are only a proxy for actual construction *cost* differences. Nevertheless, these wage estimates are a useful indicator of the order of magnitude of the lower construction costs that may be expected from the final change in the definition of prevailing wages.

B. Cost Impact of the Expanded Issuance of Semi-Skilled Classifications

The Department has long permitted exceptions from predetermined Davis-Bacon rates set for a craft classifi-

cation for apprentices and trainees who are in approved programs. The Department has also recognized a helper classification in some areas under certain well-defined situations where (1) it constitutes a separate and distinct class of workers (i.e., the scope of duties of the helper is defined and can be differentiated from journeyman duties); (2) the particular helper classification prevails in the area; and (3) the helper is not used as an informal apprentice or trainee.

During its review, the Department concluded that the current policies regarding semi-skilled crafts do not adequately reflect construction industry practices, in particular, the widespread use of helpers to perform certain craft tasks. The proposed revisions allowed for the issuance of semi-skilled classifications such as helpers or other subclassifications of a journeyman class that could be identified in the locality. Helpers were permitted as long as their use did not exceed a ratio of one helper to five journeymen. The proposal further allowed contractors to conform rates after award for helper classifications which were not issued in the wage determinations, but which the contractor felt were appropriate to performing the contract work so long as those classifications were currently utilized in the locality. The PRIA estimated that these proposed changes would result in significant cost savings of about $650 million in Fiscal Year 1982.

Many commentators viewed these cost estimates as excessively high. Contractor associations welcomed the helper classifications, but criticized the 1:5 ratio as an artificial rule that would prohibit the following of area practices. These groups argued that the ratio, coupled with the considerably lower ceilings specified by collectively bargained contracts, would significantly dampen the cost savings—to about $200 million annually. Construction unions, on the other hand, did not comment on the ratio *per se*, but instead focused on the PRIA assump-

tion that each helper employed on Davis-Bacon projects would replace one journeyman. They argued that the analysis overstated the cost savings because it ignored the low productivity of helpers relative to journeymen and the likelihood that helpers would be better substitutes for lower-paid laborers and apprentices than for journeymen. The construction unions also pointed to possible long-term cost increases due to a shortage of skilled craftsmen.

These comments prompted a thorough re-evaluation of the helper cost methodology. Some comments required no new adjustment; for example, our methodology already controlled for the minimal use of helpers on union projects. The revised helper methodology incorporated relevant criticisms from both business and labor groups to the extent permitted by available data. The revised estimates were also based on more recent data showing a sharp drop in construction industry employment (and hence anticipated helper employment on Davis-Bacon projects.)

The final helper regulations preserve the basic elements of the proposal with several changes. These changes include: (1) Lowering the ratio from 1:5 to 2:3 (2 helpers allowed for every 3 journeymen) to better reflect the diversity in industry practices, and (2) permitting helpers to include multitrade, as well as single craft, helpers to provide employers with maximum flexibility in their employment practices on Davis-Bacon jobs.

The basic methodology remains the same as that found in the PRIA—using evidence on the mix of skills in the construction industry *as a whole* to predict the increased helper employment on Davis-Bacon projects as a result of the regulation. The expected savings in wage costs on Davis-Bacon construction are derived by multiplying estimates of increased helper employment by changes in wage bills for contractors.

However, in the present analysis, we develop separate estimates of the likely cost savings from the regulations

for the unrestricted use of helpers and for alternative ratios of helpers to journeymen. In addition, we test the sensitivity of the estimates to various assumptions regarding the skill level of workers replaced by helpers. One set of cost estimates assumes that helpers replace journeymen only. A second series of cost estimates allows helpers to replace laborers as well as journeymen.

The initial step involves determining the number of construction workers employed on Davis-Bacon projects and the number of helpers likely to be employed on Federal and federally-assisted construction work. For this analysis, we use a more recent estimate of construction employment showing that there were 758,000 construction workers on Davis-Bacon projects during 1980 (the PRIA used an estimate of one million total employees in the construction industry covered by Davis-Bacon in 1979). The PRIA discusses the derivation of these estimates in further detail.

While their skill composition is unknown, we assume that in the absence of any restrictions on their use, the helper share of employment on Davis-Bacon projects would be identical to that found overall in construction (excluding residential construction under 5 stories). The estimated helper share based on the 1976-1977 BLS survey of large metropolitan areas would be 3.2 percent and 5.6 percent, depending on whether we used the entire survey or only those occupations in the survey that specifically identify helpers.

However, the helper shares estimated directly from the BLS survey may be biased because of its limitation to large metropolitan areas and the 1976-1977 period. The BLS survey shows about 78 percent of construction workers under collective bargaining agreements. Although such agreements are almost certainly more prevalent on Davis-Bacon construction than on all construction, the BLS survey probably over-represents the percent of union workers on Davis-Bacon projects nationwide. This means

that estimates of the helper employment share based on the BLS survey will be too small compared to total Davis-Bacon construction. To correct this bias, we base alternative helper estimates on the conservative assumption that the true union share of Davis-Bacon employment is 50 percent. Weighting the individual estimates found in the BLS survey shows about 78 percent of construction work-union and non-union sectors produces 5.96 percent and 9.4 percent.

This gives us four estimates of helper employment. Assuming that the high unionization rate found in the BLS survey of large cities prevails in all areas with Davis-Bacon projects, we can estimate that there will be between 24,256 and 42,448 additional helpers on Davis-Bacon projects. Assuming that 50 percent of the workers on Davis-Bacon jobs are organized would translate into higher estimates—45,328 and 71,252 additional helpers on Davis-Bacon jobs.

When helpers substitute for laborers in some cases as well as journeymen, the helper estimates need to be further adjusted. While it is difficult to evaluate the precise extent of this combined substitution, we use the estimated helper shares from above, but assume that helpers replace both types of labor as long as the proportion of laborers and journeymen found in the BLS Survey remain constant (i.e., the laborer to journeymen ratio). The BLS data shows the laborer to journeymen ratio to range between 2:5 and 5:11 for all construction projects in the sample. This produces estimates of helpers ranging from 24,256 to 64,056.

The second step is to calculate the expected hourly wage cost savings from hiring these helpers instead of journeymen. Using the PRIA procedures, we estimate the average wage differential between helpers and journeymen, based on the same 1977 BLS survey of large metropolitan areas adjusted to FY 1982 levels. This produces estimates of

$5.72 and $5.73 as the absolute wage differential between helpers and journeymen.

For the adjusted estimates where we assume that 50 percent of Davis-Bacon is covered by union contracts, it was necessary to recalculate the wage rates accordingly. Separate union percentages for journeymen and helpers from the BLS survey were used to weight the union and non-union average hourly wage rates to arrive at the new overall averages of about $6.70.

The above estimates of wage differences assume that helpers replace only journeymen. If helpers substitute for laborers in some cases as well as journeymen, the wage differences in some cases will narrow substantially —ranging from $4.95 to $5.71. The final regulatory impact analysis describes these wage calculations in further detail as well as the biases involved in the use of average wage rates.

The next ingredient needed to compute the expected cost savings is an estimate of average hours worked annually in construction. The PRIA used an estimate of 1535 hours worked per year. However, in light of the ABC comments showing that contractors' annual work hours average well over 1900 hours and the fact that seasonality is already controlled for by our use of annual averages of monthly employment levels, we used 1924 hours from *Employment and Earnings* published by the Bureau of Labor Statistics as the estimate of annual hours worked per full year construction worker to convert helper employment levels into their total hours equivalents.

Our estimates of the resulting cost savings from increased recognition of helpers with no ratio were obtained simply by multiplying number of helpers by hours worked in a year (1924) and various estimates of the existing wage differential between helpers and journeymen and laborers.

However, where there is a ceiling restriction on the employment of helpers to journeymen, another step is neces-

sary—modifying the methodology to lower the estimates of helper employment. The new calculations assume that any ceiling has no impact on the union sector, since there are few helpers in union firms. However, the 1976-1977 BLS survey suggests that outside of residential construction under 5 stories, the average non-union ratio of helpers to journeymen is around 1:4. This means that the proposed 1:5 ratio or to a lesser extent the final 2:3 ratio would be limiting for some non-union firms and that the overall helper-journeymen ratio on federally-funded non-union projects would fall somewhat below 1:5.

For our analysis, we assumed that the proposed 1:5 regulation would result in an average ratio of 1 to 5.5 on federally-funded non-union projects, while a ratio of 2:3 would result in a higher average of 1 to 4.25 on these same projects. These new ratio assumptions have the effect of lowering the previous helper estimates.

Finally, when helpers substitute for laborers in some cases as well as journeymen, the helper estimates need to be further adjusted in the presence of a ratio. In this case, the ceiling restrictions lower helper employment in the non-union sector in two ways—(1) Directly decreasing the allowed substitution of journeymen, and (2) increasing the number of laborers required to keep the proportion of laborers to journeymen constant.

The results of these calculations show that with a 1:5 ceiling and with helpers replacing journeymen, the estimated cost savings range between $263.49 million and $535.43 million. The corresponding midpoint estimate is roughly $400 million. This is the revised "best" estimate for the proposed regulation if helpers can replace only journeymen. With this same 1:5 ceiling, but with helpers replacing both laborers and journeymen, the estimated cost savings drop by approximately one-third—to $303.41 million on average. This supports the unions' contention of lower cost savings when helpers substitute for low skilled as well as higher skilled workers.

In light of the comments on the August proposal, the Department has decided to raise the ceiling from one helper for every five journeymen to two helpers for every three journeymen. The higher ratio will better reflect the wide diversity in practices among different types of construction and localities. The 2:3 ratio also increases the cost savings substantially.

If helpers replace journeymen only, the estimated cost savings range from $305.76 million to $840.95 million. This places the midpoint estimate of the likely cost savings with a 2:3 ceiling on the employment of helpers relative to journeymen at roughly $473.36 million. (This compares well to the PRIA estimates of $450 million in cost savings for the proposal under the assumption that helpers substitute only for journeymen.)

Once the final regulation is in effect, the more likely situation is one in which helpers would in some instances replace laborers as well as journeymen. If this is the case, the estimated cost savings range from $246.43 million to $479.89 million. This puts the average estimate of cost savings at $363.16 million assuming that helpers, in fact, replace both laborers and journeymen. This estimate also represents our "best guess" about the likely impact of the final regulation.

On the basis of this evidence, the Department has concluded that the final regulation will result in substantial cost savings and at the same time reflect industry practice, thereby providing contractors with the necessary flexibility in choosing their optimal employment mix on Davis-Bacon jobs. The final helper provision will also provide substantial cost savings for smaller contractors who predominate in the construction industry.

C. Summary

The final revisions discussed above, in conjunction with the changes to Part 5 of the Davis-Bacon rules (e.g. dele-

tion of the requirement for submission of weekly payroll records) will result in substantial cost savings annually of $585 million for both contractors and the government while still assuring protection of local wage rates and practices. The changes will have a substantial beneficial impact on small contractors.

Copies of the complete analysis may be obtained from the Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210.

Conclusion

The Solicitor of Labor has determined, in accordance with Executive Order 12291, that this regulation is clearly within the authority delegated to the Secretary of Labor by the Davis-Bacon Act (40 U.S.C. 276a *et seq*). Reorganization Plan No. 1950 (5 U.S.C. Appendix), and the Copeland Act (40 U.S.C. 276c), as well as 5 U.S.C. 301, 29 U.S.C. 259, and the laws listed in Appendix A of this part. The Solicitor, as set forth above in the discussion of the major issues, has determined that this regulation is consistent with the Congressional intent of the Davis-Bacon and related Acts that wage determinations issued under those Acts reflect the rates prevailing on similar construction in the locality, and that such wage determinations be incorporated in contracts subject to those Acts.

Dates of applicability. The provisions of this part shall be applicable only as to wage surveys completed on or after July 27, 1982. Except for § 1.6, which shall be applicable only to contracts entered into pursuant to invitations for bids issued or negotiations concluded on or after July 27, 1982. None of the revisions herein shall be applicable to any contract entered into prior to July 27, 1982.

This document was prepared under the direction and control of William M. Otter, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 1

Administrative practice and procedures, Government contracts, Labor, Minimum wages, Wages.

Accordingly, 29 CFR Part 1 is revised as set forth below.

Concurrent with the publication today of this final rule, the final rule previously published in the *Federal Register* on January 16, 1981 (46 FR 4306) and subsequently stayed is hereby withdrawn.

Signed at Washington, D.C. on this 25th day of May 1982.

Raymond J. Donovan,
Secretary of Labor.

Robert B. Collyer,
Deputy Under Secretary for Employment Standards.

Willam M. Otter,
Administrator, Wage and Hour Division.

PART 1—PROCEDURES FOR PREDETERMINATION OF WAGE RATES

Sec.

1.1 Purposes and scope.

1.2 Definitions.

1.3 Obtaining and compiling wage rate information.

1.4 Outline of agency construction programs.

1.5 Procedure for requesting wage determinations.

1.6 Use and effectiveness of wage determinations.

1.7 Scope of consideration.

1.8 Reconsideration by the Administrator.

1.9 Review by Wage Appeals Board.

Appendix A.

Appendix B.

Authority: 5 U.S.C. 301; R.S. 161, 64 Stat. 1267; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix 29 U.S.C. 259; 40 U.S.C. 276a-276a-7; 40 U.S.C. 276c; and the laws listed in Appendix A of this Part.

§ 1.1 Purpose and scope.

(a) The procedural rules in this part apply under the Davis-Bacon Act (946 Stat. 1494, as amended; 40 U.S.C. 276a-276a-7) and other statutes listed in Appendix A to this part which provide for the payment of minimum wages, including fringe benefits, to laborers and mechanics engaged in construction activity under contracts entered into or financed by or with the assistance of agencies of the United States or the District of Columbia, based on determinations by the Secretary of Labor of the wage rates and fringe benefits prevailing for the corresponding classes of laborers and mechanics employed on projects similar to the contract work in the local areas where such work is performed. Functions of the Secretary of Labor under these statutes and under Reorganization Plan No. 14 of 1950 (64 Stat. 1267, 5 U.S.C. Appendix), except those assigned to the Wage Appeals Board (see 29 CFR Part 7), have been delegated to the Assistant Secretary of Labor for Employment Standards who in turn has delegated the functions to the Administrator of the Wage and Hour Division, and authorized representatives.

(b) The regulations in this part set forth the procedures for making and applying such determinations of prevailing wage rates and fringe benefits pursuant to the Davis-Bacon Act, each of the other statutes listed in Appendix A, and any other Federal statute providing for determinations of such wages by the Secretary of Labor in accordance with the provisions of the Davis-Bacon Act.

(c) Procedures set forth in this part are applicable, unless otherwise indicated, both to general wage determi-

nations published in the Federal Register for contracts in specified localities, and to project wage determinations for use on contract work to be performed on a specific project.

§ 1.2 Definitions.[1]

(a)(1) The "prevailing wage" shall be the wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question. If the same wage is not paid to a majority of those employed in the classification, the "prevailing wage" shall be the average of the wages paid, weighted by the total employed in the classification.

(2) In determining the "prevailing wages" at the time of issuance of a wage determination, the Administrator will be guided by paragraph (a)(1) of this section and will consider the types of information listed in § 1.3 of this part.

(b) The term "area" in determining wage rates under the Davis-Bacon Act and the prevailing wage provisions of the other statutes listed in Appendix A shall mean the city, town, village, county or other civil subdivision of the State in which the work is to be performed.

(c) The term "Administrator" shall mean the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, or authorized representative. In the absence of the Wage-Hour Administrator, the Deputy Administrator of the Wage and Hour Division is designated to act for the Administrator under this part. Except as otherwise provided in this part, the Assistant Administrator for Government Contract Wage Standards is the authorized representative of the Administrtor for the performance of functions relating to the making of wage determinations.

---

[1] These definitions are not intended to restrict the meaning of the terms as used in the applicable statutes.

(d) The term "agency" shall mean the Federal agency, State highway department under 23 U.S.C. 113, or recipient State or local government under Title 1 of the State and Local Fiscal Assistance Act of 1972.

§ 1.3 Obtaining and compiling wage rate information.

For the purpose of making wage determinations, the Administrator will conduct a continuing program for the obtaining and compiling of wage rate information.

(a) The Administrator will encourage the voluntary submission of wage rate data by contractors, contractors' associations, labor organizations, public officials and other interested parties, reflecting wage rates paid to laborers and mechanics on various types of construction in the area. The Administrator may also obtain data from agencies on wage rates paid on construction projects under their jurisdiction. The information submitted should reflect not only the wage rates paid a particular classification in an area, but also the type or types of construction on which such rate or rates are paid, and whether or not such rates were paid on Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements.

(b) The following types of information may be considered in making wage rate determinations:

(1) Statements showing wage rates paid on projects. Such statements should include the names and addresses of contractors, including subcontractors, the locations, approximate costs, dates of construction and types of projects, whether or not the projects are Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements, the number of workers employed in each classification on each project, and the respective wage rates paid such workers.

(2) Signed collective bargaining agreements. The Administrator may request the parties to an agreement to submit statements certifying to its scope and application.

(3) Wage rates determined for public construction by State and local officials pursuant to State and local prevailing wage legislation.

(4) In making wage rate determinations pursuant to 23 U.S.C. 113, the highway department of the State in which a project in the Federal-Aid highway system is to be performed shall be consulted. Before making a determination of wage rates for such a project the Administrator shall give due regard to the information thus obtained.

(5) Wage rate data submitted to the Department of Labor by contracting agencies pursuant to 29 CFR 5.5 (a)(1)(ii).

(6) Any other information pertinent to the determination of prevailing wage rates.

(c) The Administrator may initially obtain or supplement such information obtained on a voluntary basis by such means, including the holding of hearings, and from any sources determined to be necessary. All information of the types described in § 1.3(b) of this part, pertinent to the determination of the wages prevailing at the time of issuance of the wage determination, will be evaluated in the light of § 1.2(a) of this Part.

(d) In compiling wage rate data for building and residential wage determinations, the Administrator will not use data from Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements unless it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data. Data from Federal or federally assisted projects will be used in compiling wage rate data for heavy and highway wage determinations.

§ 1.4 Outline of agency construction programs.

To the extent practicable, at the beginning of each fiscal year each agency using wage determinations under any of

the various statutes listed in Appendix A will furnish the Administrator with a general outline of its proposed construction programs for the coming year indicating the estimated number of projects for which wage determinations will be required, the anticipated types of construction, and the locations of construction. During the fiscal year, each agency will notify the Administrator of any significant changes in its proposed construction programs, as outlined at the beginning of the fiscal year. This report has been cleared in accordance with FPMR 101-11.11 and assigned interagency report control number 1671-DOL-AN.

§ 1.5 Procedure for requesting wage determinations.

(a)(1) Except as provided in paragraph (b) of this section, the Federal agency shall initially request a wage determination under the Davis-Bacon Act or any of its related prevailing wage statutes by submitting Standard Form 308 to the Department of Labor at this address:

U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Branch of Construction Wage Determinations, Washington, D.C. 20210.

The agency shall check only those classifications on the applicable form which will be needed in the performance of the work. Inserting a note such as "entire schedule" or "all applicable classifications" is not sufficient. Additional classifications needed which are not on the form may be typed in the blank spaces or on a separate list and attached to the form.

(2) In completing SF-306, the agency shall furnish:

(i) A sufficiently detailed description of the work to indicate the type of construction involved. Additional description or separate attachment, if necessary for identification of type of project, shall be furnished.

(ii) The county (or other civil subdivision) and State in which the proposed project is located.

(3) Such request for a wage determination shall be accompanied by any pertinent wage payment informa-

tion which may be available. When the requesting agency is a State highway department under the Federal-Aid Highway Acts as codified in 23 U.S.C. 113, such agency shall also include its recommendations as to the wages which are prevailing for each classification of laborers and mechanics on similar construction in the area.

(b) Whenever the wage patterns in a particular area for a particular type of construction are well settled and whenever it may be reasonably anticipated that there will be a large volume of procurement in that area for such a type of construction, the Administrator, upon the request of a Federal agency or in his/her discretion, may publish a general wage determination in the Federal Register when, after consideration of the facts and circumstances involved, the Administrator finds that the applicable statutory standards and those of this part will be met. If there is a general wage determination applicable to the project, the agency may use it without notifying the Department of Labor, *provided*, that questions concerning its use shall be referred to the Department of Labor in accordance with § 1.6(b).

(c) The time required for processing requests for wage determinations varies according to the facts and circumstances in each case. An agency should anticipate that such processing in the Department of Labor will take at least 30 days.

§ 1.6 Use of effectiveness of wage determinations.

(a)(1) Project wage determinations initially issued shall be effective for 180 calendar days from the date of such determinations. If such a wage determination is not used in the period of its effectiveness it is void. Accordingly, if it appears that a wage determination may expire between bid opening and contract award (or between initial endorsement under the National Housing Act or the execution of an agreement to enter into a housing assistance payments contract under section 8 of

the U.S. Housing Act of 1937, and the start of construction) the agency shall request a new wage determination sufficiently in advance of the bid opening to assure receipt prior thereto. However, when due to unavoidable circumstances a determination expires before award but after bid opening (or before the start of construction, but after initial endorsement under the National Housing Act, or before the start of construction but after the execution of an agreement to enter into a housing assistance payments contract under Section 8 of the U.S. Housing Act of 1937), the head of the agency or his or her designee may request the Administrator to extend the expiration date of the wage determination in the bid specifications instead of issuing a new wage determination. Such request shall be supported by a written finding, which shall include a brief statement of the factual support, that the extension of the expiration date of the determination is necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment in the conduct of Government business. The Administrator will either grant or deny the request for an extension after consideration of all of the circumstances, including an examination to determine if the previously issued rates remain prevailing. If the request for extension is denied, the Administrator will proceed to issue a new wage determination for the project.

(2) General wage determinations issued pursuant to § 1.5(b) and which are published in the Federal Register, shall contain no expiration date.

(b) Contracting agencies are responsible for insuring that only the appropriate wage determination(s) are incorporated in bid solicitations and contract specifications and for designating specifically the work to which such wage determinations will apply. Any question regarding application of wage rate schedules shall be referred to the Administrator, who shall give foremost consideration to area practice in resolving the question.

(c)(1) Project and general wage determinations may be modified from time to time to keep them current. A modification may specify only the items being changed, or may be in the form of a supersedeas wage determination, which replaces the entire wage determination. Such actions are distingiushed from a determination by the Administrator under paragraphs (d), (e) and (f) of this section that an erroneous wage determination has been issued or that the wrong wage determination or wage rate schedule has been utilized by the agency.

(2)(i) All actions modifying a project wage determination received by the agency before contract award (or the start of construction where there is no contract award) shall be effective except as follows:

(A) In the case of contracts entered into pursuant to competitive bidding procedures, modifications received by the agency less than 10 days before the opening of bids shall be effective unless the agency finds that there is not a reasonable time still available before bid opening, to notify bidders of the modification and a report of the finding is inserted in the contract file. A copy of such report shall be made available to the Administrator upon request. No such report shall be required if the modification is received after bid opening.

(B) In the case of projects assisted under the National Housing Act, modifications shall be effective if received prior to the beginning of construction or the date the mortgage is initially endorsed, whichever occurs first.

(C) In the case of projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937, modifications shall be effective if received prior to the beginning of construction or the date the agreement to enter into a housing assistance payments contract is executed, whichever occurs first.

(ii) Modifications to project wage determinations and superseades wage determinations shall not be effective af-

ter contract award (or after the beginning of construction where there is no contract award).

(iii) Actual written notice of a modification shall constitute receipt.

(3) All actions modifying a general wage determination shall be effective with respect to any project to which the determination applies, if published before contract award (or the start of construction where there is no contract award), except as follows:

(i) In the case of contracts entered into pursuant to competitive bidding procedures, modifications published less than 10 days before the opening of bids shall be effective unless the agency finds that there is not a reasonable time still available before bid opening to notify bidders of the modification and a report of the finding is inserted in the contract file. A copy of such report shall be made available to the Administrator upon request. No such report shall be required if the modification is published after bid opening.

(ii) In the case of projects assisted under the National Housing Act, modifications shall be effective if published prior to the beginning of construction or the date the mortgage is initially endorsed, whichever occurs first.

(iii) In the case of projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937, modifications shall be effective if published prior to the beginning of construction or the date the agreement to enter into a housing assistance payments contract is signed, whichever occurs first.

(iv) If under paragraph (c)(3)(i) of this section the contract has not been awarded within 90 days after bid opening, or if under paragraph (c)(3)(ii) or (iii) of this section construction has not begun within 90 days after initial endorsement or the signing of the agreement to enter into a housing assistance payments contract, any modifications published in the Federal Register

prior to award of the contract or the beginning of construction, as appropriate, shall be effective with respect to that contract unless the head of the agency or his or her designee requests and obtains an extension of the 90-day period from the Administrator. Such request shall be supported by a written finding, which shall include a brief statement of the factual support, that the extension is necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment in the conduct of Government business. The Administrator will either grant or deny the request for an extension after consideration of all the circumstances.

(v) A modification to a general wage determination is "published" within the meaning of this section on the date of publication in the Federal Register, or on the date the agency receives actual written notice of the modification from the Department of Labor, whichever occurs first.

(vi) Modifications or supersedeas wage determinations to an applicable general wage determination published after contract award (or after the beginning of construction where there is no contract award) shall not be effective.

(d) Upon his/her own initiative or at the request of an agent, the Administrator may correct any wage determination, without regard to paragraph (c) of this section, whenever the Administrator finds such a wage determination contains clerical errors. Such corrections shall be included in any bid specifications containing the wage determination, or in any on-going contract containing the wage determination in question, retroactively to the start of construction.

(e) Written notification by the Department of Labor prior to the award of a contract (or the start of construction under the National Housing Act, under section 8 of the U.S. Housing Act of 1937, or where there is no contract award) that (1) there is included in the bidding

documents or solicitation the wrong wage determination or the wrong schedule or that (2) a wage determination is withdrawn by the Department of Labor as a result of a decision by the Wage Appeals Board, shall be effective immediately without regard to paragraph (c) of this section.

(f) The Administrator may issue a wage determination after contract award or after the beginning of construction if the agency has failed to incorporate a wage determination in a contract required to contain prevailing wage rates determined in accordance with the Davis-Bacon Act, or has used a wage determination which by its terms or the provisions of this part clearly does not apply to the contract. Further, the Administrator may issue a wage determination which shall be applicable to a contract after contract award or after the beginning of construction when it is found that the wrong wage determination has been incorporated in the contract because of an inaccurate description of the project or its location in the agency's request for the wage determination. Under any of the above circumstances, the agency shall either terminate and resolicit the contract with the valid wage determination, or incorporate the valid wage determination retroactive to the beginning of construction through supplemental agreement or through change order, *provided* that the contractor is compensated for any increases in wages resulting from such change. The method of incorporation of the valid wage determination, and adjustment in contract price, where appropriate, should be in accordance with applicable procurement law.

(g) If Federal funding or assistance under a statute requiring payment of wages determined in accordance with the Davis-Bacon Act is not approved prior to contract award (or the beginning of construction where there is no contract award), the agency shall request a wage determination prior to approval of such funds. Such a wage determination shall be issued based upon

the wages and fringe benefits found to be prevailing on the date of award or the beginning of construction (under the National Housing Act, under section 8 of the U.S. Housing Act of 1937 or where there is no contract award), as appropriate, and shall be incorporated in the contract specifications retroactively to that date, *provided*, that upon the request of the head of the agency in individual cases the Administrator may issue such a wage determination to be effective on the date of approval of Federal funds or assistance whenever the Administrator finds that it is necessary and proper in the public interest to prevent injustice or undue hardship, *provided further* that the Administrator finds no evidence of intent to apply for Federal funding or assistance prior to contract award or the start of construction, as appropriate.

§ 1.7 Scope of consideration.

(a) In making a wage determination, the "area" will normally be the county unless sufficient current wage data (data on wages paid on current projects or, where necessary, projects under construction no more than one year prior to the beginning of the survey or the request for a wage determination, as appropriate) is unavailable to make a wage determination.

(b) If there has not been sufficient similar construction within the area in the past year to make a wage determination. Wages paid on similar construction in surrounding counties may be considered, *provided* that projects in metropolitan counties may not be used as a source of data for a wage determination in a rural county, and projects in rural counties may not be used as a source of data for a wage determination for a metropolitan county.

(c) If there has not been sufficient similar construction in surrounding counties or in the State in the past year, wages paid on projects completed more than one year

prior to the beginning of the survey or the request for a wage determination, as appropriate, may be considered.

(d) Classifications and wage rates will be issued for identifiable "classes of laborers and mechanics." Semi-skilled classifications of helpers will be issued when the classifications are identifiable in the area. The use of helpers, apprentices and trainees is permitted in accordance with Part 5 of this subtitle.

§ 1.8 Reconsideration by the Administrator.

Any interested person may seek reconsideration of a wage determination issued under this part or of a decision of the Administrator regarding application of a wage determination. Such a request for reconsideration shall be in writing accompanied by a full statement of the interested person's views and any supporting wage data or other pertinent information. The Administrator will respond within 30 days of receipt thereof, or will notify the requestor within the 30 day period that additional time is necessary.

§ 1.9 Review by Wage Appeals Board.

Any interested person may appeal to the Wage Appeals Board for a review of a wage determination or its application made under this part, after reconsideration by the Administrator has been sought pursuant to § 1.8 and denied. Any such appeal may, in the discretion of the Wage Appeals Board, be received, accepted, and decided in accordance with the provisions of 29 CFR Part 7 and such other procedures as the Board may establish.

Appendix A

Statutes Related to the Davis-Bacon Act Requiring Payment of Wages at Rates Predetermined by the Secretary of Labor

1. The Davis-Bacon Act (secs. 1-7, 46 Stat. 1494, as amended; Pub. L. 74-403, 40 U.S.C. 276a-276a-7).

2. National Housing Act (sec. 212 added to c. 847, 48 Stat. 1246, by sec. 14, 53 Stat. 807; 12 U.S.C. 1715c and repeatedly amended).

3. Housing Act of 1950 (college Housing) (amended by Housing Act of 1959 to add labor provisions, 73 Stat. 681; 12 U.S.C. 1749a(f)).

4. Housing Act of 1959 (sec. 401(f) of the Housing Act of 1950 as amended by Pub. L. 80-372, 73 Stat. 681; 12 U.S.C. 1701q(c)(3)).

5. Commercial Fisheries Research and Development Act of 1964 (sec. 7, 78 Stat. 199; 16 U.S.C. 779e(b)).

6. Library Services and Construction Act (sec. 7(a), 78 Stat. 13; 20 U.S.C. 355c(a)(4), as amended).

7. National Technical Institute for the Deaf Act (sec. 5(b)(5), 79 Stat. 126; 20 U.S.C. 684(b)(5)).

8. National Foundation on the Arts and Humanities Act of 1965 (sec. 5(k), 79 Stat. 846 as amended; 20 U.S.C. 954(j)).

9. Elementary and Secondary Education Act of 1965 as amended by Elementary and Secondary and other Education Amendments of 1969 (sec. 423 as added by Pub. L. 91-230, title IV, sec. 401(a)(10), 84 Stat. 169, and renumbered sec. 433, by Pub. L. 92-318; title III, sec. 301(a)(1), 86 Stat. 326; 20 U.S.C. 1232(b)). Under the amendment coverage is extended to all programs administered by the Commission of Education.

10. The Federal-Aid Highway Acts (72 Stat. 895, as amended by 82 Stat. 821; 23 U.S.C. 113);

11. Indians Self-Determination and Education Assistance Act (sec. 7, 88 Stat. 2205; 25 U.S.C. 450e).

12. Indian Health Care Improvement Act (sec. 303(b), 90 Stat. 1407; 25 U.S.C. 1633(b)).

13. Rehabilitation Act of 1973 (sec. 306(b)(5), 87 Stat. 384, 29 U.S.C. 776(b)(5)).

14. Comprehensive Employment and Training Act of 1973 (sec. 606, 87 Stat. 880, renumbered sec. 706 by 83 Stat. 1845; 29 U.S.C. 966; also sec. 604, 88 Stat. 1846; 29 U.S.C. 964(b)(3)).

15. State and Local Fiscal Assistance Act of 1972 (sec. 123(a)(6), 86 Stat. 933; 31 U.S.C. 1246(a)(6)).

16. Federal Water Pollution Control Act (sec. 513 of sec. 2, 86 Stat. 894; 33 U.S.C. 1372).

17. Veterans Nursing Home Care Act of 1964 (78 Stat. 502, as amended; 38 U.S.C. 5035(a)(8)).

18. Postal Reorganization Act (sec. 410(b)(4)(C); 84 Stat. 726 as amended; 39 U.S.C. 410(b)(4)(C)).

19. National Visitors Center Facilities Act of 1968 (sec. 110, 32 Stat. 45; 40 U.S.C. 808).

20. Appalachian Regional Development Act of 1965 (sec. 402, 79 Stat. 21; 40 U.S.C. App. 402).

21. Health Services Research, Health Statistics, and Medical Libraries Act of 1974 (sec. 107, see sec. 306(h)(2) thereof, 63 Stat. 370, as amended by 90 Stat. 376; 42 U.S.C. 242m(h)(2)).

22. Hospital Survey and Construction Act, as amended by the Hospital and Medical Facilities Amendments of 1964 (sec. 605(a)(5), 78 Stat. 453; 42 U.S.C. 291e(a)(5)).

23. Health Professions Education Assistance Act (sec. 303(b), 90 Stat. 2254; 42 U.S.C. 293a(g)(1)(C); also sec. 308a, 90 Stat. 2356; 42 U.S.C. 293a(c)(7)).

24. Nurse Training Act of 1964 (sec. 941(a)(1)(C), 89 Stat. 364; 42 U.S.C. 296a(b)(5)).

25. Heart Disease, Cancer, and Stroke Amendments of 1965 (sec. 904, as added by sec. 2, 79 Stat. 928; 42 U.S.C. 299(b)(4)).

26. Safe Drinking Water Act (sec. 2(a), see sec. 1450e thereof, 83 Stat. 1691; 42 U.S.C. 300j-9(e)).

27. National Health Planning and Resources Act (sec. 4, see sec. 1604(b)(1)(H), 88 Stat. 2261; 42 U.S.C. 3000o-3(b)(1)(H)).

28. U.S. Housing Act of 1937, as amended and recodified (88 Stat. 667; 42 U.S.C. 1437j).

29. Demonstration Cities and Metropolitan Development Act of 1966 (secs. 110, 311, 503, 1003, 80 Stat. 1259, 1270, 1277; 42 U.S.C. 3310; 12 U.S.C. 1715c; 42 U.S.C. 1437j).

30. Slum clearance program; Housing Act of 1949 (sec. 109, 63 Stat. 419, as amended; 42 U.S.C. 1459).

31. Farm Housing Act of 1964 (adds sec. 516(f) to Housing Act of 1949 by sec. 503, 78 Stat. 797; 42 U.S.C. 1486(f)).

32. Housing Act of 1961 (sec. 707, added by sec. 907, 79 Stat. 496, as amended; 42 U.S.C. 1500o-3).

33. Defense Housing and Community Facilities Act of 1951 (sec. 310, 65 Stat. 307; 42 U.S.C. 1592i).

34. Special Health Revenue Sharing Act of 1975 (sec. 303, see sec. 222(a)(5) thereof, 89 Stat. 324; 42 U.S.C. 2689j(a)(5)).

35. Economic Opportunity Act of 1964 (sec. 607, 78 Stat. 532; 42 U.S.C. 2947).

36. Headstart, Economic Opportunity, and Community Partnership Act of 1974 (sec. 11, see sec. 811 thereof, 88 Stat. 2327; 42 U.S.C. 2992a).

37. Housing and Urban Development Act of 1965 (sec. 707, 79 Stat, 492 as amended; 42 U.S.C. 3107).

38. Older Americans Act of 1965 (sec. 502, Pub. L. 89-73, as amended by sec. 501, Pub. L. 93-29; 87 Stat. 50; 42 U.S.C. 3041a(a)(4)).

39. Public Works and Economic Development Act of 1965 (sec. 712, 79 Stat. 575, as amended; 42 U.S.C. 3222).

40. Juvenile Delinquency Prevention Act (sec. 1, 86 Stat. 536; 42 U.S.C. 3884).

41. New Communities Act of 1968 (sec. 410.82, Stat. 516; 42 U.S.C. 3909).

42. Urban Growth and New Community Development Act of 1970 (sec. 727(f), 84 Stat. 1803; 42 U.S.C. 4529).

43. Domestic Volunteer Service Act of 1973 (sec. 406, 87 Stat. 410; 42 U.S.C. 5046).

44. Housing and Community Development Act of 1974 (secs. 110, 802(g), 83 Stat. 649, 724; 42 U.S.C. 5310, 1440(g)).

45. Developmentally Disabled Assistance and Bill of Rights Act (sec. 126(4), 89 Stat. 488; 42 U.S.C. 6042 (4); title I, sec. 111, 89 Stat. 491; 42 U.S.C. 6063(b) (19)).

46. National Energy Conservation Policy Act (sec. 312, 92 Stat. 3254; 42 U.S.C. 6371j).

47. Public Works Employment Act of 1976 (sec. 109, 90 Stat. 1001; 42 U.S.C. 6706; also sec. 206, 90 Stat. 1006; 42 U.S.C. 6728).

48. Energy Conservation and Production Act (sec. 45 (h), 90 Stat. 1168; 42 U.S.C. 6881(h)).

49. Solid Waste Disposal Act (sec. 2, 90 Stat. 2828; 42 U.S.C. 6979).

50. Rail Passenger Service Act of 1970 (sec. 405d, 84 Stat. 1337; 45 U.S.C. 565(d)).

51. Urban Mass Transportation Act of 1964 (sec. 10, 78 Stat. 307; renumbered sec. 13 by 88 Stat. 715; 49 U.S.C. 1609).

52. Highway speed ground transportation study (sec. 6(b), 79 Stat. 893; 49 U.S.C. 1636(b)).

53. Airport and Airway Development Act of 1970 (sec. 22(b), 84 Stat. 231; 49 U.S.C. 1722(b)).

54. Federal Civil Defense Act of 1950 (50 U.S.C. App. 2281(i)).

55. National Capital Transportation Act of 1965 (sec. 3(b)(4), 79 Stat; 40 U.S.C. 682(b)(4)).

Note.—Repealed Dec. 9, 1969 and labor standards incorporated in sec. 1-1431 of the District of Columbia Code.

56. Model Secondary School for the Deaf Act (sec. 4, 80 Stat. 1027, Pub. L. 89-694, but not in the United States Code.

57. Delaware River Basin Compact (sec. 15.1, 75 Stat. 714, Pub. L. 87-328) (considered a statute for purposes of this part but not in the United States Code).

58. Energy Security Act (Sec. 175(c), Pub. L. 96-294, 94 Stat. 611; 42 U.S.C. 8701 note).

Appendix B

Boston Region

For the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, JFK Federal Building, Government Center, Room 1612C, Boston, Massachusetts 02203 (telephone: 617-223-5565).

New York Region

For the States of New Jersey and New York and for the Canal Zone, Puerto Rico, and the Virgin Islands:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, 1515 Broadway, Room 3300, New York, New York 10036 (telephone: 212-399-5443).

Philadelphia Region

For the States of Delaware, Maryland, Pennsylvania, Virginia, and West Virginia, and the District of Columbia:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, Gateway Building, Room 15220, 3535 Market Street, Philadelphia, Pennsylvania 19104 (telephone: 215-596-1193).

Atlanta Region

For the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, 1371 Peachtree Street, N.E., Room 305, Atlanta, Georgia 30309 (telephone: 404-881-4801).

Chicago Region

For the States of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, Illinois 60604 (telephone: 312-353-7249).

Dallas Region

For the States of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, 555 Griffin Square Building, Young and Griffin Streets, Dallas, Texas 75202 (telephone: 214-767-6891).

Kansas City Region

For the States of Iowa, Kansas, Missouri, and Nebraska:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, Federal Office Building, Room 2000, 911 Walnut Street, Kansas City, Missouri 64106 (telephone: 816-374-5386).

Denver Region

For the States of Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, Federal Office Building, Room 1440, 1961 Stout Street, Denver, Colorado 80294 (telephone: 304-837-4613).

San Francisco Region

For the States of Arizona, California, Hawaii, and Nevada:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, 450 Golden Gate Avenue, Room 10353, San Francisco, California 94102 (telephone: 415-556-3592).

Seattle Region

For the States of Alaska, Idaho, Oregon and Washington:

Assistant Regional Administrator for Wage-Hour, Employment Standards Administration, U.S. Department of Labor, Federal Office Building, Room 4141, 909 First Avenue, Seattle, Washington 96174 (telephone: 206-442-1916).

DEPARTMENT OF LABOR

Wage and Hour Division, Employment Standards Administration

Office of the Secretary

29 CFR Part 5

Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act)

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: This document provides the final text of regulations, 29 CFR Part 5, Subpart A, on labor standards applicable to contracts for federally financed and assisted construction subject to the Davis-Bacon and Related Acts and contracts subject to the Contract Work Hours and Safety Standards Act (CWHSSA). Changes have been made to eliminate the requirement that contractors and subcontractors submit weekly payrolls to the appropriate Federal agencies, and to provide for the increased use of helpers on covered projects. In addition, the definition of the "site of the work" has been revised for clarification.

DATES: Effective date: July 27, 1982, except § 5.5(a)(1)(ii), (iv) and (a)(3)(i), which contain information collection requirements which are under review at OMB. See Supplementary Information for dates of applicability.

FOR FURTHER INFORMATION CONTACT: William M. Otter, Administrator, Wage and Hour Division, Em-

ployment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW., Washington, D.C. 30210. Telephone: 202-323-8305.

SUPPLEMENTARY INFORMATION: On December 28, 1979, a proposal was published in the Federal Register (44 FR 77080) to make certain revisions to Subpart A of Regulations, 29 CFR Part 5, Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act). The purpose of this proposal was to revise, update, and clarify this subpart.

On January 16, 1981, the regulation was published in the Federal Register (46 FR 4380) as a final rule with a scheduled effective date of February 17, 1981. However, pursuant to the President's Memorandum of January 29, 1981, the Department published a notice in the Federal Register on February 6, 1981 (46 FR 11253), delaying implementation of this regulation until March 30, 1981. The Department subsequently delayed the implementation of this regulation until August 15, 1981 in order to permit reconsideration of the rule pursuant to Executive Order 12291. See 46 FR 18973 (March 27, 1981); 46 FR 23739 (April 28, 1981); 46 FR 33514 (June 30, 1981); and 46 FR 36140 (July 14, 1981).

On August 14, 1981, a new regulatory proposal developed in accordance with Executive Order 12291 was published in the Federal Register (48 FR 41456) and the previously published rule was further postponed until action could be taken on the new proposal. (See 46 FR 41043.)

Interested persons were afforded the opportunity to submit comments to the Wage and Hour Division within 60 days after publication of the proposal in the Federal Register. Comments were received from approximately 2,209

interested parties, including members of Congress, contracting agencies, contractor associations, contractors, labor organizations, State and local governmental agencies, business organizations, and individuals. Many comments were received either supporting or opposing the proposal in general. More than 1,000 comments (mostly from contractors and contractor associations) were directed solely to the issue of whether the use of helpers should be limited to a ratio to journeymen of 1:5, as had been proposed.

Contractor associations and business organizations submitting comments included the Associated General Contractors of America (AGC), the Associated Builders and Contractors, Inc. (ABC), the National Association of Home Builders (NAHB), the Chamber of Commerce of the United States (C of C), the National Association of Manufacturers (NAM), the Business Roundtable, the National Federation of Independent Business, the National Utility Contractors Association (NUCA), the Sheet Metal and Air Conditioning Contractors' National Association, Inc., the American Road and Transportation Builders Association, the National League of Cities (NLC), the National Association of Counties, the Council of State Housing Agencies, the National Sand and Gravel Association, the National Ready Mixed Concrete Association, and others. Labor unions and organizations commenting on the proposal included the Building and Construction Trades Department of the American Federation of Labor-Congress of Industrial Organizations (BCTD), the Laborers' International Union of North America (LIUNA), the United Brotherhood of Carpenters and Joiners of America (UBC), the International Brotherhood of Electrical Workers (IBEW), the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry (UA), the International Brotherhood of Teamsters (Teamsters), the International Association of Bridge, Structural and Ornamental Iron Workers (Iron Workers), the International Union of Operat-

ing Engineers (IUOE), the United Automobile Workers of America (UAW), the Sheet Metal Workers' International Association (SMW), the Operative Plasterers' and Cement Masons' International Association (OPCM), the International Brotherhood of Painters and Allied Trades (PAT), and others. Among those Federal agencies submitting comments were the Department of Defense (DOD), the Department of Transportation (DOT), the Department of Energy (DOE), the National Aeronautics and Space Administration (NASA), the U.S. Postal Service (USPS), the General Services Administration (GSA), and the Small Business Administration (SBA).

Discussion of Major Comments

The following is an analysis of all the principal comments received and the corresponding changes, if any, made to the proposed rule. Each submission has been thoroughly reviewed, and each criticism and suggestion has been given careful consideration. For each section and, where appropriate, subsection of the final rule, the analysis contains a description of the major comments, the Department's conclusions regarding those comments, and the substantive changes herein adopted.

Section 5.2(1)—Definition of "Site of Work"

The ABC, AGC, several other contractor associates, individual contractors, and DOT opposed the proposed definition of "site of work", stating it was an expansion of statutory coverage and, in addition, was confusing and subject to different interpretations. They recommended that the definition be limited to the physical places where the construction work is to be performed. Some contractor associations suggested excluding any commercial material supplier or other similar operation located near, but not on, the actual location of the construction project if the operation is established prior to the start of contract work.

Labor organizations, including the BCTD, the Teamsters, and the UAW, commented that the proposed definition unduly restricted Davis-Bacon coverage by placing limitations on coverage of facilities not directly on the construction site, thus depriving workers at such facilities of labor standards protections.

The Department's proposal would codify its longstanding interpretation of "site of work" in the regulations. Necessarily, the provision embodies some flexibility in order to allow for its application to the varied fact situations encountered in particular cases.

However, in response to industry comments, this section has been clarified, explicitly providing that operations of a "commercial supplier" or "materialman" established by the supplier of the materials prior to the opening of bids and not located at the actual site of the project are not covered by the Act.

Sections 5.2(n)(4), 5.5(a)(1)(ii)(A), and 5.5(a)(4)(iv) —Helpers

Many commentators, including the ABC, AGC, NAM, NAHB, the Business Roundtable, the C of C, and individual contractors, generally favored the proposal to increase recognition of a semi-skilled helper classification; however, they opposed the ratio limitations on their use contained in the proposal at § 5.5(a)(4)(iv). While some of the commentators argued that the use of helpers varies too greatly by craft, job needs, and geographic area to establish a fixed nationwide ratio, a number simply recommended a more liberal ratio. The AGC also opposed the requirement in the conformance procedures in § 5.5 (a)(1)(ii)(A) that helper wage rates must bear a "reasonable relationship" to the rates on the wage determination.

The building trades unions and some State and local governmental agencies opposed increased recognition of

helpers on the grounds that this would undermine formally established apprentice and trainee programs to the detriment of minorities and unskilled workers, and would lead to shortages of qualified journeymen.

Several commentators expressed the view that the proposed definition in § 5.2(n)(4) was too broad to distinguish helpers' duties from those of a journeyman or apprentice. A parallel concern, particulary articulated by the Laborers' International Union, is that the proposed definition is essentially a statement of traditional laborers' work, and consequently could result in the misclassifition of workers into lower paying jobs.

The Department currently recognizes a helper classification only where it is a separate and distinct class of workers, which prevails in the area, and where the helpers' scope of duties can be differentiated from those of journeymen. When the use of helpers has been permitted under these criteria, no ratio as to their use has been applied.

Increased recognition of helpers, both helpers working in a particular craft and cross-craft or general utility helpers, reflects the widespread industry practice of employing semi-skilled workers (with some overlap between their duties and those of journeymen) on construction projects. The very large number of comments received reflects a wide acceptance of the proposed helper definition. Section 5.2(n)(4) is therefore adopted as proposed.

However, in view of the concerns expressed that the proposed ratio of one helper to five journeymen did not give adequate consideration to the number of helpers used in the industry, the Department has concluded that a more liberal ratio would be consistent with the statutory intent and provide training opportunities.

Accordingly, the ratio has been changed to permit not more than two helpers for every three journeymen (or not more than 40 percent of the total number of helpers

and journeymen) in the contractor's workforce, as illustrated by the following chart:

Journeymen	Helpers	Total [1]
1	0	1
2	0	2
2	1	3
3	1	4
3	2	5
4	2	6
5	2	7
5	3	8
6	3	9
6	4	10
7	4	11
8	4	12
8	5	13
9	5	14
9	6	15
10	6	16

[1] Helpers and journeymen.

To assure that the ratio does not disrupt existing established local practices in areas where wage determinations currently contain helper classifications without restriction as to the number permitted, interested parties (which would include contracting agencies), prior to bid opening on a contract, may request a variance from the ratio provision pursuant to § 5.14 of the regulations. Such variances will be considered for the applicable helper classification(s) upon a showing that the wage determination for the type of construction in effect in the area prior to the effective date of these regulations contains one or more helper classifications, and that there was a practice in the area of utilizing such helpers on Davis-Bacon projects in excess of a ratio of two to every three jonrneymen in the classification.

With respect to the comment regarding conformance of wage rates, it is fundamental to this process that a reasonable relationship be maintained to the wages for the various job classifications on the wage determination. Accordingly, § 5.5(a)(1)(A)(ii) is adopted without change. (See also the related changes proposed to 29 CFR Part 1 regarding the issuance of helper classifications on wage determinations and the discussion of comments received hereon.)

Section 5.5(a)(1)(ii)(B)—Review of Conformances Agreed to by the Interested Parties

No comments were received concerning the conformance procedures. However, as a result of DOL's review of the proposal, it has been determined that a modification is appropriate to ensure consistence in procedures contained in § 5.5(a)(1)(ii)(B) and (C). Ordinarily, DOL expects to complete review of proposed conformance actions agreed to by the interested parties within a 30 day period as provided in the proposed regulations. However, in a few instances, more time is needed, especially where an area practice survey is necessary to ascertain prevailing wage relationships and/or the proper classification of the unlisted classes. Accordingly, the language of this section is amended to allow DOL (with notification to the agency) additional time to complete a review.

Section 5.5(a)(2) and (a)(3)—Cross-Withholding

The ABC the NAHB, other contractor associations and some State highway agencies opposed the provisions which would allow agencies to withhold contract monies due a contractor from contracts other than those on which the alleged violations occurred if necessary to satisfy Davis-Bacon and Contract Work Hours and Safety Standards Act underpayments ("cross-withholding"). These groups contended that neither statute authorizes cross-withholding, citing *Whitney Bros. Plumbing and Heating* v.

United States (224 F.Supp. 860 (D. Alaska 1963)). They further contended that these proposals would, in effect, redelegate withholding authority from the contracting agency to the DOL.

The BCTD and other labor organizations opposed the limitation on cross-withholding to those contracts which involve the same prime contractors as unduly restrictive.

Both the Davis-Bacon Act and the CWHSSA require that all covered contracts contain language to permit the contracting agency to withhold funds to satisfy unpaid wages. Because neither statute specifically provides for cross-withholding, agencies generally have refrained from doing so. Accordingly, many contractors and subcontractors have escaped payment of back wages because violations were not discovered until after final payment of the contract had been made.

The decision in *Whitney Bros.* precluded withholding from another contract under the language of the contract clause in the regulations as they existed at that time. In Decision No. B-177554 (March 22, 1973), the GAO recommended that the Department adopt regulations specifically permitting cross-withholding. In addition, GAO commented in favor of the cross-withholding provisions contained in the stayed DOL regulations of January 16, 1981, which were substantially identical to the current proposal.

While the Department recognizes that the contracting officer undertakes the actual withholding of payment of contract funds, it is clear that to require the agency to take withholding action upon request of DOL is not a redelegation of the contracting agency's authority. Rather, it is simply the exercise of DOL authority under Reorganization Plan No. 14 of 1950 in order to accomplish the enforcement and oversight responsibilities.

With respect to the comments by labor organizations that the cross-withholding provisions are unduly restric-

tive, we note that the provisions are so structured because the Government has no direct contractual relationship with subcontractors, and because prime contractors are responsible for violations committed by their subcontractors.

Accordingly, no substantive changes are being made in these sections. However, § 5.5(b)(3) is amended to correspond to the language in § 5.5(a)(2), which specifically states that cross-withholding is only permitted on contracts with the same prime contractor.

Section 5.5(a)(3)(ii) and (iii)—Elimination of Weekly Payroll Submission Requirement

Numerous commentators, including ABC, AGC, several regional and State contractor associations, and the Postal Service commented that eliminating the submission of weekly payroll reports would result in significant construction cost savings, alleviate unnecessary paperwork burdens, simplify contract administration, and still comply with the requirements of the Copeland Act. However, ABC disagreed with the proposal to permit agencies, at their discretion, to request payroll reports. It argued that existing recordkeeping, inspection, and posting requirements are sufficient to ensure compliance; it also maintained that the proposed provision would only cause confusion among contractors as to what their obligations are because of possible differing reporting requirements from one agency to another. Some commentators suggested requiring the submission of the compliance statements only at certain points during the course of the project, such as at the beginning and the end of the project.

The BCTD, UAW, Teamsters, and several other labor organizations, a few contractor associations, GSA, and several State and local contracting agencies opposed the elimination of the weekly payroll submission on the grounds that its elimination would make it more difficult for agencies and DOL to monitor compliance with the

Davis-Bacon and Copeland Acts, while increasing enforcement costs. They further contended that weekly payroll submissions are not an onerous recordkeeping burden on contractors since the records must be kept anyway, and questioned the Department's authority to eliminate what they regard as a statutory requirement of the Copeland Act.

The Department believes that the provisions of the Copeland Act requiring a weekly statement with respect to the wages paid each employee during the preceding week can be legally satisfied by the weekly submission of a statement certifying that the wages paid are in compliance with the Act. Further, this proposed change is in accord with the Department's mandate, under the Paperwork Reduction Act, to reduce unnecessary paperwork burdens on the public wherever possible.

With respect to the arguments regarding the provision allowing contracting agencies to request payroll submissions at their discretion, the Department recognizes the significant role of the agencies in assuring compliance with the Davis-Bacon and Copeland Act standards. Therefore, we believe it necessary and appropriate to provide a mechanism whereby the procuring agencies can obtain payroll information where deemed-necessary to insure compliance. However, § 5.6(a)(3) of the final regulation has been revised to provide that requests for payroll submissions will only be made as part of a specific compliance check or enforcement action. Clarifying changes have also been made to § 5.5(a)(3).

With regard to the comments that enforcement would be more difficult with the elimination of weekly payroll submissions, the regulations continue to require the maintenance of payrolls and basic records by the contractor. They further require that such records be submitted for inspection on request of the agency or the Department of Labor. Failure to submit such records upon request may be grounds for debarment. In addition, the regula-

tions specify that falsification of the weekly statement of compliance may subject the contractor or subcontractor to civil or criminal prosecution under Section 1001 of Title 18 and Section 231 of Title 31 of the United States Code. The Department feels that these requirements are sufficient to ensure enforcement of the Act.

It should be noted that notwithstanding the change in reporting, prime contractors continue to be responsible for insuring that all laborers and mechanics employed on the contract are paid in compliance with the Davis-Bacon and Related Acts. Accordingly, since subcontractors will only be required to submit a weekly statement of compliance, and will no longer be required to submit copies of their payrolls each week, prime contractors may wish to provide in their subcontracts for the examination of subcontractor payrolls.

Section 5.5(a)(9)—Disputes Concerning Labor Standards

Several commentators objected to the portion of § 5.5(a)(9) which states that disputes arising out of the labor standards provisions of the contract are not subject to the general disputes clause of the contract, but rather to the provisions of Parts 5, 6, and 7 of this Title. Federal agencies commented that the provision conflicts with the authority of the contracting officer as set forth in the Contract Disputes Act of 1978 (Pub. L. 95-563, 41 U.S.C. Sec. 601 *et seq.*). Reorganization Plan No. 14 of 1950, as explained in the President's message accompanying the plan, invests in the Secretary of Labor the responsibility "to coordinate the administration of laws relating to wages and hours on Federally-financed or assisted projects by prescribing standards, regulations, and procedures to govern the enforcement activities of the various Federal agencies." With respect to the Contract Disputes Act of 1978, section 14 of that statute sets forth specific amendments to existing statutes. Significantly, no change, repeal, amendment, or other reference was made to the Davis-Bacon and Related Acts, the Con-

tract Work Hours and Safety Standards Act, the Copeland Act, or Reorganization Plan No. 14 of 1950. Therefore, in our view, the Department's authority to resolve disputes under these statutes and Reorganization Plan No. 14 is not impinged by section 14 of the Contract Disputes Act. This conclusion is corroborated by section 6(a) of the Contract Disputes Act, which states in pertinent part, that "the authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine."

To insure effective and consistent administration, the authority to resolve labor disputes should reside in the Department of Labor, since it is the agency which has the primary responsibility for protecting labor standards and the expertise in the law and the regulations. It should be noted that the General Accounting Office stated previously that it had no objection to the adoption of this provision. Accordingly, this section is hereby adopted.

Section 5.5(a)(10)—Certification of Eligibility

ABC and DOT opposed the provisions prohibiting contract award to a potential contractor where another person or firm which has been debarred pursuant to section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1) has "an interest" in a bidder's firm, asserting that the phrase "an interest" is too vague and that the regulation should prohibit contract award only where a person or firm has a "controlling" or "substantial" interest.

Section 3(a) of the Davis-Bacon Act prohibits the award of contracts to a firm in which another person or firm debarred because of violations of the Act has "an interest", while § 5.12(a)(1) of the regulations prohibits award if a person or firm, debarred for violations of a related Act, has "a substantial interest" in the potential contractor's firm. In both cases, the intent is to prohibit

debarred persons or firms from evading the ineligibility sanctions by using another legal entity to obtain Government contracts.

Although the language of the Davis-Bacon Act requires debarment of any firm in which a debarred contractor has an "interest", the regulation, as drafted, is not intended to prohibit bidding by a potential contractor where a debarred person or firm holds only a nominal interest in the potential contractor's firm. Accordingly, no changes are made in this section. Decisions as to whether "an interest" exists will be made on a case-by-case basis considering all relevant factors.

In addition to the above, minor editorial and language changes have been made in some sections.

Classification

This rule would not appear to require a regulatory impact analysis under Executive Order 12291 since the changes will result in substantial cost savings annually for both contractors and the Government while still assuring protection of local wage rates and practices. However, because of the importance to the Government and the public of the issues involved, the Department has concluded that the regulation should be deemed a "major rule" for purposes of the Executive Order. It has been determined, in accordance with Executive Order 12291, that these changes are the most cost-effective regulatory alternatives consistent with the purpose of the statute.

Summary of Final Regulatory Impact and Regulatory Flexibility Analysis

The Department has prepared its final regulatory impact analysis to identify and quantify the cost impact of the final Davis-Bacon regulations and various alternatives that were explored and to inform the public of the economic considerations behind final revisions in accordance with Executive Order 12291.

The final analysis builds upon a preliminary regulatory impact analysis (PRIA) which accompanied the proposed revisions published on August 14, 1961 (46 FR 41444). The PRIA estimated that the proposed changes would result in substantial cost savings amounting to at least $670 million annually to both contractors and procuring agencies, while still assuring protection of local wage rates and practices. The Department requested comments and additional information on all economic assumptions used in the analysis, as well as any alternative suggestions designed to achieve the objectives of the Davis-Bacon and Related Acts at lower costs. The Department received numerous comments on the PRIA estimates and its economic assumptions. The Department has carefully reviewed all of these comments in finalizing the regulations and has incorporated these considerations, as appropriate, into the final regulatory impact analysis (FRIA).

The final regulation must also consider the Regulatory Flexibility Act of 1980. This Act requires agencies to prepare regulatory flexibility analyses and to develop flexible alternatives whenever possible in drafting regulations that will have "a significant economic impact on a substantial number of small entities." The analysis summarized below meets the requirements set forth for assessing the economic impact of the final changes in the Davis-Bacon regulations on small entities as required under the Regulatory Flexibility Act.

A. Cost Savings from Eliminating Weekly Payroll Submissions

Current DOL regulations implementing the Copeland Act in 29 CFR Part 5 require contractors to submit a statement of compliance together with a copy of the weekly payroll. Contractors have raised numerous concerns that the requirements for weekly submissions of payroll records impose substantial administrative bur-

dens on contractors, while contributing little to enforcement of the Davis-Bacon Act.

The January 16 regulation made it clear that contractors were allowed to submit payroll records in any form, thereby eliminating the costs of transcribing payroll data onto the optional government forms. The August proposal went even further—eliminating payroll submissions entirely, requiring only a weekly certified "Statement of Compliance". However, under the proposal agencies were permitted to request submissions of payrolls where necessary. The Department also considered eliminating all weekly submissions, but concluded that the Copeland Act requires that contractors submit each week a statement on the wages paid to each employee during the preceding week. The proposed regulation thus conformed with the recommendations of two study groups of the Commission on Government Procurement.* The PRIA estimated the cost of compliance with these weekly payroll submissions at $100 million.

Contractor associations generally supported these changes and the cost estimates. However, ABC argued that the cost savings were only $50 million and further that the Department should eliminate individual agency discretion to request payroll reports because it would only cause confusion among contractors as to what their obligations are because of possible differing reporting requirements from one agency to another. Construction unions commenting on the preliminary analysis challenged the reliability of these estimates, arguing that the true savings are far lower. They also found the analysis inadequate for ignoring the enforcement benefits of the payroll reporting requirement and argued that elimination of payrolls would make it difficult for agencies and DOL to monitor compliance with the Davis-Bacon and Copeland Acts, while increasing compliance costs. How-

* See GAO, *The Davis-Bacon Act Should be Repealed*, April 1979, pp. 78-82.

ever, the PRIA in fact acknowledged the biases in the estimates of cost savings. Even allowing for these biases, the likely cost savings would still appear substantial. Moreover, the union data on back wages recovered through Davis-Bacon enforcement actions using payroll submissions leads us to conclude that the payroll reporting requirement is an inefficient enforcement tool. Most of this amount would be recovered even without the reporting requirement since retention of payrolls is mandatory and they must be made available upon request.

After careful review of the evidence, the Department has concluded that this proposed change meets the Administration's objective of eliminating unnecessary reporting burdens imposed on the public and should be adopted. However, the final regulation has been revised to provide that requests for payroll submission will only be made as part of a specific compliance check or enforcement action. These final changes recognize the fact that weekly submissions of payrolls are simply not cost-effective since these forms are infrequently used by many Federal agencies. The final regulation should substantially eliminate the $100 million in administrative costs involved.

While we have made no independent estimate of the administrative costs associated with this provision because of data limitations, several estimates of the costs of compliance with the Davis-Bacon and Copeland Act reporting requirements are available.

A previous DOL, estimate uses a 5.5 million estimate of the annual burden hours for compliance with the Paperwork Reduction Act. Assuming a $5.00 hourly wage rate for a bookkeeper for these burden hours, this procedure produces a $27.5 million estimate of the costs of Davis-Bacon reporting requirements.

A second estimate comes from a 1972 survey by the Associated General Contractors of America (AGC) of its membership to estimate the administrative costs to the payroll reporting requirements of the Davis-Bacon Act.

Thirty-four respondents reported estimates of administrative costs per million dollars of contract price. On the basis of this information, AGC estimated that .5 percent of the overall cost of Davis-Bacon contracts was accounted for by the payroll reporting and recordkeeping requirements. Applying this estimate to the FY 1982 estimated value of Federal construction of $30.3 billion yields an annual cost saving of nearly $152 million.

This study provides an upperbound estimate of the resulting cost savings since it includes other recordkeeping items such as the maintenance and storage of detailed payrolls on each employee for specified time periods and the prominent posting of wages paid each worker at their work site. However, the cost of weekly payroll submissions were certainly a large component of these administrative costs. Moreover, on the basis of GAO's estimate of about 600,000 prime and subcontracts annually, this estimate translates into about $250 per contract, a not unreasonable estimate of the costs of compliance with this provision. Finally, this survey refers to 1973 administrative costs and is not adjusted to reflect subsequent increases in costs. GAO's estimate which is based on this survey adjusts the AGC figure downward to $100 million to reflect the likely survey biases. This appears to be an appropriate estimate of the likely reduction in administrative costs from eliminating the weekly payroll submissions.

Much of these cost savings would be passed on to the 53,865 smaller contractors with fewer than 20 employees involved in construction work. These small contractors account for 56 percent of government contractors, but only about 15 percent of government-owned construction receipts. Since both the AGC and ABC surveys indicated that administrative costs were relatively higher for these small contractors, we used both percentages to estimate the impact of eliminating weekly payroll submissions on smaller contractors. The resulting estimated cost savings

in these small contractors range from $15 million to $56 million annually.

B. Cost Impact of the Expanded Issuance of Semi-Skilled Classifications

The Department has long permitted exceptions from predetermined Davis-Bacon rates set for a craft classification for apprentices and trainees who are in approved programs. The Department has also recognized a helper classification in some areas under certain well-defined situations where (1) it constitutes a separate and distinct class of workers (i.e., the scope of duties of the helper is defined and can be differentiated from journeyman duties); (2) the particular helper classification prevails in the area; and (3) the helper is not used as an informal apprentice or trainee.

During its review, the Department concluded that the current policies regarding semi-skilled crafts do not adequately reflect construction industry practices, in particular, the widespread use of helpers to perform certain craft tasks. The proposed revisions allowed for the issuance of semi-skilled classifications such as helpers or other subclassifications of a journeyman class that could be identified in the locality. Helpers were permitted as long as their use did not exceed a ratio of one helper to five journeymen. The proposal further allowed contractors to conform rates after award for helper classifications which were not issued in the wage determinations, but which the contractor felt were appropriate to performing the contract work so long as those classifications were currently utilized in the locality. The PRIA estimated that these proposed changes would result in significant cost savings of about $450 million in Fiscal Year 1982.

Many commentators viewed these cost estimates as excessively high. Contractor associations welcomed the helper classifications, but criticized the 1:5 ratio as an artificial rule that would prohibit the following of area

practices. These groups argued that the ratio, coupled with the considerably lower ceilings specified by collectively bargained contracts, would significantly dampen the cost savings—to about $200 million annually. Construction unions, on the other hand, did not comment on the ratio *per se*, but instead focused on the PRIA assumptions that each helper employed on Davis-Bacon projects would replace one journeyman. They argued that the analysis overstated the cost savings because it ignored the low productivity of helpers relative to journeymen and the likelihood that helpers would be better substitutes for lower-paid laborers and apprentices than for journeymen. The construction unions also pointed to possible long-term cost increases due to a shortage of skilled craftsmen.

These comments prompted a thorough re-evaluation of the helper cost methodology. Some comments required no new adjustment; for example, our methodology already controlled for the minimal use of helpers on union projects. The revised helper methodology incorporated relevant criticisms from both business and labor groups to the extent permitted by available data. The revised estimates were also based on more recent data showing a sharp drop in construction industry employment (and hence anticipated helper employment on Davis-Bacon projects).

The final helper regulations preserve the basic elements of the proposal with several changes. These changes include: (1) Lowering the ratio from 1:5 to 2:3 (2 helpers allowed for every 3 journeymen) to better reflect the diversity in industry practices, and (2) permitting helpers to include multitrade, as well as single craft, helpers to provide employers with maximum flexibility in their employment practices on Davis-Bacon jobs.

The basic methodology remains the same as that found in the PRIA—using evidence on the mix of skills in the construction industry *as a whole* to predict the increased

helper employment on Davis-Bacon projects as a result of the regulation. The expected savings in wage costs on Davis-Bacon construction are derived by multiplying estimates of increased helper employment by changes in wage bills for contractors.

However, in the present analysis, we develop separate estimates of the likely cost savings from the regulations for the unrestricted use of helpers and for alternative ratios of helpers to journeymen. In addition, we test the sensitivity of the estimates to various assumptions regarding the skill level of workers replaced by helpers. One set of cost estimates assumes that helpers replace journeymen only. A second series of cost estimates allows helpers to replace laborers as well as journeymen.

The initial step involves determining the number of construction workers employed on Davis-Bacon projects and the number of helpers likely to be employed on Federal and federally-assisted construction work. For this analysis, we use a more recent estimate of construction employment showing that there were 758,000 construction workers on Davis-Bacon projects during 1980 (the PRIA used an estimate of one million total employees in the construction industry covered by Davis-Bacon in 1979). The FRIA discusses the derivation of these estimates in further detail.

While their skill composition is unknown, we assume that in the absence of any restrictions on their use, the helper share of employment on Davis-Bacon projects would be identical to that found overall in construction (excluding residential construction under 5 stories). The estimated helper share based on the 1976-1977 BLS survey of large metropolitan areas would be 3.2 percent and 5.6 percent, depending on whether we used the entire survey or only those occupations in the survey that specifically identify helpers.

However, the helper shares estimated directly from the BLS survey may be biased because of its limitation to

large metropolitan areas and the 1976-1977 period. The BLS survey shows about 78 percent of construction workers under collective bargaining agreements. Although such agreements are almost certainly more prevalent on Davis-Bacon construction than on all construction, the BLS survey probably over-represents the percent of union workers on Davis-Bacon projects nationwide. This means that estimates of the helper employment share based on the BLS survey will be too small compared to total Davis-Bacon construction. To correct this bias, we base alternative helper estimates on the conservative assumption that the true union share of Davis-Bacon employment is 50 percent. Weighting the individual estimates found in the BLS survey data of helper employment shares within the union and non-union sectors produces adjusted estimates of the helper share of 5.96 percent and 9.4 percent.

This gives us four estimates of helper employment. Assuming that the high unionization rate found in the BLS survey of large cities prevails in all areas with Davis-Bacon projects, we can estimate that there will be between 24,256 and 42,448 additional helpers on Davis-Bacon projects. Assuming that 50 percent of the workers on Davis-Bacon jobs are organized would translate into higher estimates—45,328 and 71,252 additional helpers on Davis-Bacon jobs.

When helpers substitute for laborers in some cases as well as journeymen, the helper estimates need to be further adjusted. While it is difficult to evaluate the precise extent of this combined substitution, we use the estimated helper shares from above, but assume that helpers replace both types of labor as long as the proportion of laborers and journeymen found in the BLS Survey remains constant (i.e., the laborer to journeymen ratio). The BLS data shows the laborer to journeymen ratio to range between 2:5 and 5:11 for all construction projects in the sample. This produces estimates of helpers ranging from 24,256 to 64,056.

The second step is to calculate the expected hourly wage cost savings from hiring these helpers instead of journeymen. Using the PRIA procedures, we estimate the average wage differential between helpers and journeymen, basd on the same 1977 BLS survey of large metropolitan areas adjusted to FY 1982 levels. This produces estimates of $5.72 and $5.73 as the absolute wage differential between helpers and journeymen.

For the adjusted estimates where we assume that 50 percent of Davis-Bacon is covered by union contracts, it was necessary to recalculate the wage rates accordingly. Separate union percentages for journeymen and helpers from the BLS survey were used to weight the union and non-union average hourly wage rates to arrive at the new overall averages of about $6.70.

The above estimates of wage differences assume that helpers replace only journeymen. If helpers substitute for laborers in some cases as well as journeymen, the wage differences in some cases will narrow substantially—ranging from $4.95 to $5.71. The final regulatory impact analysis describes these wage calculations in further detail as well as the biases involved in the use of average wage rates.

The next ingredient needed to compute the expected cost savings is an estimate of average hours worked annually in construction. The PRIA used an estimate of 1535 hours worked per year. However, in light of the ABC comments showing that contractors' annual work hours average well over 1900 hours and the fact that seasonality is already controlled for by our use of annual averages of monthly employment levels, we used 1924 hours from *Employment and Earnings* published by the Bureau of Labor Statistics as the estimate of annual hours worked per full year construction worker to convert helper employment levels into their total hours equivalents.

Our estimates of the resulting cost savings from increased recognition of helpers with no ratio were obtained

simply by multiplying numbers of helpers by hours worked in a year (1924) and various estimates of the existing wage differential between helpers and journeymen and laborers.

However, where there is a ceiling restriction on the employment of helpers to journeymen, another step is necessary—modifying the methodology to lower the estimates of helper employment. The new calculations assume that any ceiling has no impact on the union sector, since there are few helpers in union firms. However, the 1976-1977 BLS survey suggests that outside of residential construction under 5 stories, the average non-union ratio of helpers to journeymen is around 1:4. This means that the proposed 1:5 ratio or to a lesser extent the final 2:3 ratio would be limiting for some non-union firms and that the overall helper:journeymen ratio on federally-funded non-union projects would fall somewhat below 1:5.

For our analysis, we assumed that the proposed 1:5 regulation would result in an average ratio of 1 to 5.5 on federally-funded non-union projects, while a ratio of 2:3 would result in a higher average of 1 to 4.25 on these same projects. These new ratio assumptions have the effect of lowering the previous helper estimates.

Finally, when helpers substitute for laborers in some cases as well as journeymen, the helper estimates need to be further adjusted in the presence of a ratio. In this case the ceiling restrictions lower helper employment in the non-union sector in two ways—(1) directly decreasing the allowed substitution of journeymen, and (2) increasing the number of laborers required to keep the proportion of laborers to journeymen constant.

The result of these calculations show that with a 1:5 ceiling and with helpers replacing journeymen, the estimated cost savings range between $283.40 million and $535.43 million. The corresponding midpoint estimate is roughly $400 million. This is the revised "best" estimate

for the proposed regulation if helpers can replace only journeymen. With this same 1:5 ceiling, but with helpers replacing both laborers and journeymen, the estimate cost savings drop by approximately one-third—to $303.41 million on average. This supports the union's contention of lower cost savings when helpers substitute for low skilled as well as higher skilled workers.

In light of the comments on the August proposal, the Department has decided to raise the ceiling from one helper for every five journeymen to two helpers for every three journeymen. The higher ratio will better reflect the wide diversity in practices among different types of construction and localities. The 2:3 ratio also increases the cost savings substantially.

If helpers replace journeymen only, the estimated cost savings range from $305.76 million to $640.95 million. This places the midpoint estimate of the likely cost savings with a 2:3 ceiling on the employment of helpers relative to journeymen at roughly $473.36 million. (This compares well to the PRIA estimates of $450 million in cost savings for the proposal under the assumption that helpers substitute only for journeymen.)

Once the final regulation is in effect, the more likely situation is one in which helpers would in some instances replace laborers as well as journeymen. If this is the case, the estimated cost savings range from $248.43 million to $479.80 million. This puts the average estimate of cost savings at $363.16 million assuming that helpers, in fact, replace both laborers and journeymen. This estimate also represents our "best guess" about the likely impact of the final regulation.

On the basis of this evidence, the Department has concluded that the final regulation will result in substantial cost savings and at the same time reflect industry practice, thereby providing contractors with the necessary flexibility in choosing their optimal employment mix on

Davis-Bacon jobs. The final helper provision will also provide substantial cost savings for smaller contractors who predominate in the industry.

C. Summary

The final revisions discussed above, in conjunction with the changes proposed to Part 1 of the Davis-Bacon rules (e.g. a change in the definition of "prevailing rate") will result in substantial cost savings annually of $585 million for both contractors and the government, while still assuring protection of local wage rates and practices. The changes will have a substantial beneficial impact on small contractors.

Copies of the complete analysis may be obtained from the Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1960 (Pub. L. 96-511), the reporting and recordkeeping provisions that are included in §§ 5.5(a)(1)(ii), 5.5(a)(1)(iv), and 5.5(a)(3)(i) have been or will be submitted for approval to the Office of Management and Budget (OMB). They are not effective until OMB approval has been obtained and the public notified to that effect through a technical amendment to the regulation.

Other information collection requirements contained in this regulation (see §§ 5.5(a)(3)(i), 5.5(c), and 5.5(d)(1) and (3) have been approved by the Office of Management and Budget under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB Control Number 1215-0017.

Conclusion

The Solicitor of Labor has determined in accordance with Executive Order 12201, that this regulation is clearly

within the authority delegated to the Secretary of Labor by the Davis-Bacon Act (40 U.S.C. 276a *et seq.*). Reorganization Plan No. 14 of 1950 (5 U.S.C. Appendix), the Copeland Act (40 U.S.C. 276c), the Contract Work Hours and Safety Standard Act (40 U.S.C. 327 *et seq.*), as well as 5 U.S.C. 301, 29 U.S.C. 259, and the remaining laws listed in § 5.1(a) of this part. The Solicitor, as set forth above in the discussion of the major issues, has determined that this regulation is consistent with the Congressional intent of the Davis-Bacon and related Acts that contractors on Federal and federally assisted projects subject to these Acts pay their workers at least the prevailing wages established in accordance with industry classification and wage practices. The regulation also provides protection for the workers and mechanisms for enforcement, as intended by the Davis-Bacon and related Acts, CWHSSA, and the Copeland Act.

Dates of Applicability

The provisions of §§ 5.2 and 5.5 of this part shall be applicable only as to contracts entered into pursuant to invitations for bids issued or negotiations concluded on or after July 27, 1992, *Provided*, however, that § 5.5(a)(1)(ii) concerning submission of a weekly "Statement of Compliance" will be applicable July 27, 1982 with respect to existing contracts, if the contracting agency and the contractor agree to amend the contract to delete the clause contained in existing § 5.5(a)(1)(ii) requiring weekly submission of payrolls, and incorporate § 5.5(a)(1)(ii) herein in the contract.

This document was prepared under the direction and control of William M. Otter, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 5

Government contracts, investigations, Labor, Minimum wages, Penalties, Recordkeeping requirements, Reporting requirements, Wages.

Accordingly, 29 CFR Part 5 is revised as set forth below.

Concurrent with the publication today of this final rule, the final rule previously published in the Federal Register on January 16, 1961 (46 FR 4380) and subsequently stayed is hereby withdrawn.

Signed at Washington, D.C. on this 25th day of May 1982.

Raymond J. Donovan,
Secretary of Labor.

Robert B. Collyer,
Deputy Under Secretary for EMPLOYMENT *Standards.*

William M. Otter,
Administrator, Wage and Hour Division.

PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)

Subpart A—Davis-Bacon and Related Acts Provisions and Procedures

Sec.

5.1 Purpose and scope.

5.2 Definitions.

5.3 [Reserved]

5.4 [Reserved]

5.5 Contract provisions and related matters.

5.6 Enforcement.

5.7 Reports to the Secretary of Labor

5.8 Liquidated damages under the Contract Work Hours and Safety Standards Act.

5.9 Suspension of funds.

5.10 Restitution, criminal action.

5.11 Department of Labor hearings.

5.12 Debarment proceedings.

5.13 Rulings and interpretations.

5.14 Variations, tolerance and exemptions from Parts 1 and 3 of this subtitle and this part.

5.15 Limitations, variations, tolerances, and exemptions under the Contract Work Hours and Safety Standards Act.

5.16 Training plans approved or recognized by the Department of Labor prior to August 20, 1976.

5.17 Withdrawal of approval of a training program.

* * * * *

Authority: 40 U.S.C. 276a-276a-7; 40 U.S.C. 276c; 40 U.S.C. 327-332; Reorganization Plan No. 14 of 1960, 5 U.S.C. Appendix; 5 U.S.C. 301; and the statutes listed in section 5.1(a) of this part.

§ 5.1 Purpose and scope.

(a) The regulations contained in this part are promulgated under the authority conferred upon the Secretary of Labor by Reorganization Plan No. 14 of 1960 and the Copeland Act in order to *coordinate* the administration and enforcement of the labor standards provisions of each of

the following acts by the Federal agencies responsible for their administration and of such additional statutes as may from time to time confer upon the Secretary of Labor additional duties and responsibilities similar to those conferred upon the Secretary of Labor under Reorganization Plan No. 14 of 1950:

1. The Davis-Bacon Act (sec. 1-7, 46 Stat. 1949, as amended; Pub. L. 74-103, 40 U.S.C. 276a-276c-7).

2. Copeland Act (40 U.S.C. 276c)

3. The Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333).

4. National Housing Act (sec. 212 added to c. 847, 48 Stat. 1246, by sec. 14, 53 Stat. 807; 12 U.S.C. 1715a and repeatedly amended).

5. Housing Act of 1960 (college housing) (amended by Housing Act of 1959 to add labor provisions, 73 Stat. 681; 12 U.S.C. 1749a(f)).

6. Housing Act of 1959 (sec. 401(f) of the Housing Act of 1960 as amended by Pub. L. 86-372, 73 Stat. 681; 12 U.S.C. 1761q(c)(3)).

7. Commercial Fisheries Research and Development Act of 1964 (sec. 7, 78 Stat. 199; 16 U.S.C. 779e(b)).

8. Library Services and Construction Act (sec. 7(a), 78 Stat. 13; 20 U.S.C. 355c(a)(4), as amended).

9. National Technical Institute for the Deaf Act (sec. 5(b)(5); 79 Stat. 128, 20 U.S.C. 684(b)(5)).

10. National Foundation on the Arts and Humanities Act of 1965 (sec. 5(k), 79 Stat, 846 as amended; 20 U.S.C. 954(j)).

11. Elementary and Secondary Education Act of 1965 as amended by Elementary and Secondary and other Education Amendments of 1969 (sec. 423 as added by Pub. L. 91-230, title IV, sec. 401(a)(10), 84 Stat, 169, and re-

numbered sec. 433, by Pub. L. 92-316; title III, sec. 301 (a)(1), 86 Stat. 326; 20 U.S.C. 1232(b)). Under the amendment coverage is extended to all programs administered by the Commissioner of Education.

12. The Federal-Aid Highway Acts (72 Stat. 895, as amended by 82 Stat. 821; 23 U.S.C. 113).

13. Indian Self-Determination and Education Assistance Act (sec. 7, 88 Stat. 2205; 25 U.S.C. 450a).

14. Indian Health Care Improvement Act (sec. 303 (b), 90 Stat. 1407; 25 U.S.C. 1633(b)).

15. Rehabilitation Act of 1973 (sec. 308(b)(5) 87 Stat. 364, 29 U.S.C. 776(b)(5).

16. Comprehensive Employment and Training Act of 1973 (sec. 606, 87 Stat. 880, renumbered sec. 706 by 88 Stat. 1845; 29 U.S.C. 966; also sec. 804, 88 Stat. 1846; 29 U.S.C. 964(b)(3)).

17 State and Local Fiscal Assistance Act of 1972 (sec. 123(a)(8), 86 Stat. 933; 31 U.S.C. 1246(a)(6)).

18. Federal Water Pollution Control Act (sec. 513 of sec. 2, 86 Stat. 894; 33 U.S.C. 1372).

19. Veterans Nursing Home Care Act of 1964 (78 Stat. 502, as amended; 38 U.S.C. 5035(a)(8)).

20. Postal Reorganization Act (sec. 401(b)(4)(C); 84 Stat. 726 as amended; 39 U.S.C. 401(b)(4)(C)).

21. National Visitors Center Facilities Act of 1968 (sec. 110, 32 Stat. 45; 49 U.S.C. 808).

22. Appalachian Regional Development Act of 1965 (sec. 402, 79 Stat. 21; 40 U.S.C. App. 402.)

23. Health Services Research, Health Statistics, and Medical Libraries Act of 1974 (sec. 107, see sec. 308(h)(2) thereof, 88 Stat. 370, as amended by 90 Stat. 378; 42 U.S.C. 242m(h)(2)).

24. Hospital Survey and Construction Act, as amended by the Hospital and Medical Facilities Amendments of 1964 (sec. 605(a)(5), 78 Stat. 453; 42 U.S.C. 291e(a)(5)).

25. Health Professions Educational Assistance Act (sec. 303(b), 90 Stat. 2254; 42 U.S.C. 293a(g)(1)(C); also sec. 306a, 90 Stat. 2258, 42 U.S.C. 293a(c)(7))

26. Nurse Training Act of 1964 (sec. 941(a)(1)(C), 89 Stat. 364; 42 U.S.C. 296a(b)(5)).

27. Heart Disease, Cancer, and Stroke Amendments of 1965 (sec. 904, as added by sec. 2, 79 Stat. 928; 42 U.S.C. 299d(b)(4)).

28. Safe Drinking Water Act (sec. 2(a) see sec. 1450e thereof, 88 Stat. 1691; 42 U.S.C. 330j-9(e)).

29. National Health Planning and Resources Act (sec. 4, see sec. 1604(b)(1)(H), 88 Stat. 2261, 42 U.S.C. 300o-3(b)(1)(H)).

30. U.S. Housing Act of 1937, as amended and recodified (86 Stat. 667; 42 U.S.C. 1437j).

31. Demonstration Cities and Metropolitan Development Act of 1966 (secs. 110, 311, 503, 1003, 80 Stat 1250, 1270, 1277, 1284; 42 U.S.C. 3310; 12 U.S.C. 1715c; 42 U.S.C. 1437j).

32 Slum clearance program: Housing Act of 1949 (sec. 109, 63 Stat. 419, as amended; 42 U.S.C. 1459).

33. Farm housing: Housing Act of 1964 (adds sec. 516(f) to Housing Act of 1949 by sec. 503, 78 Stat. 797; 42 U.S.C. 1486(f)).

34. Housing Act of 1961 (sec. 707, added by sec. 967, 79 Stat. 495, as amended; 42 U.S.C. 1500o-3).

35. Defense Housing and Community Facilities and Services Act of 1951 (sec. 310, 65 Stat. 307; 42 U.S.C. 1592i).

36. Special Health Revenue Sharing Act of 1975 (sec. 303, see sec. 222(a)(5) thereof, 89 Stat. 324; 42 U.S.C. 2689j(a)(5)).

37. Economic Opportunity Act of 1964 (sec. 607, 78 Stat. 532; 42 U.S.C. 2947).

38. Headstart, Economic Opportunity, and Community Partnership Act of 1974 (sec. 11, see sec. 811 thereof, 86 Stat. 2327; 42 U.S.C. 2992a).

39. Housing and Urban Development Act of 1965 (sec. 707, 79 Stat. 492 as amended; 42 U.S.C. 3107).

40. Older Americans Act of 1965 (sec. 502, Pub. L. 89-73, as amended by sec. 501, Pub. L. 93-29; 87 Stat. 50; 42 U.S.C. 3401a(a)(4)).

41. Public Works and Economic Development Act of 1965 (sec. 712; 79 Stat. 575 as amended; 42 U.S.C. 3222).

42. Juvenile Delinquency Prevention Act (sec. 1, 86 Stat. 536; 42 U.S.C. 3684).

43. New Communities Act of 1966 (sec. 410, 82 Stat. 516; 42 U.S.C. 3809).

44. Urban Growth and New Community Development Act of 1970 (sec. 727(f), 84 Stat. 1803; 42 U.S.C. 4529).

45. Domestic Volunteer Service Act of 1973 (sec. 406, 87 Stat. 410; 42 U.S.C. 5046).

46. Housing and Community Development Act of 1974 (sec. 110, 802(g), 86 Stat. 649, 724; 42 U.S.C. 4310, 1440(g)).

47. Developmentally Disabled Assistance and Bill of Rights Act (sec. 126(4), 60 Stat. 488; 42 U.S.C. 6042(4); title I, sec. 111, 89 Stat. 491; 42 U.S.C. 6063(b)(19)).

48. National Energy Conservation Policy Act. (sec. 312, 92 Stat. 3254; 42 U.S.C. 6371j).

49. Public Works Employment Act of 1976 (sec. 109, 90 Stat. 1001; 42 U.S.C. 6706; also sec. 208, 90 Stat. 1008; 42 U.S.C. 6728).

50. Energy Conservation and Production Act (sec. 451 (h), 90 Stat. 1168; 42 U.S.C. 6881(h)).

51. Solid Waste Disposal Act (sec. 2, 90 Stat. 2823; 42 U.S.C. 6979).

52. Rail Passenger Service Act of 1970 (sec. 405d, 84 Stat. 1337; 35 U.S.C. 565(d)).

53. Urban Mass Transportation Act of 1964 (sec. 10, 78 Stat. 307; renumbered sec. 13 by 88 Stat. 715; 40 U.S.C. 1609).

54. Highway Speed Ground Transportation Study (sec. 6(b), 79 Stat. 893; 49 U.S.C. 1636(b)).

55. Airport and Airway Development Act of 1970 (sec 22(b), 84 Stat. 231; 49 U.S.C. 1722(b)).

56. Federal Civil Defense Act of 1960 (50 U.S.C. 2281i).

57. National Capital Transportation Act of 1965 (sec. 3(b)(4), 79 Stat. 644; 40 U.S.C. 682(b)(4). Note.—Repealed December 9, 1969, and labor standards incorporated in sec. 1-1431 of the District of Columbia Code).

58. Model Secondary School for the Deaf Act (sec. 4, 80 Stat. 1027, Pub. L. 89-694, but not in the United States Code).

59. Delaware River Basin Compact (sec. 15.1, 75 Stat. 714, Pub. L. 87-326) (considered a statute for purposes of the plan but not in the United States Code).

60. Energy Security Act (sec. 175(c), Pub. L. 96-294, 94 Stat. 611; 42 U.S.C. 8701 note).

(b) Part 1 of this subtitle contains the Department's procedural rules governing requests for wage determina-

tions and the issuance and use of such wage determinations under the Davis-Bacon Act and its related statutes as listed in that part.

§ 5.2 Definitions.

(a) The term "Secretary" includes the Secretary of Labor, the Deputy Under Secretary for Employment Standards, and their authorized representatives.

(b) The term "Administrator" means the Administrator of the Wage and Hour Division or the authorized representative as set forth in this part. In the absence of the Wage-Hour Administrator, the Deputy Administrator of the Wage and Hour Division, is designated to act for the Administrator under this Part. Except as otherwise provided in this Part, the Assistant Administrator for Government Contract Wage Standards is the authorized representative of the Administrator in the administration of the statutes listed in § 5.1.

(c) The term "Federal agency" means the agency or instrumentality of the United States which enters into the contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to the project subject to a statute listed in § 5.1.

(d) The term "Agency Head" means the principal official of the Federal agency and includes those persons duly authorized to act in the behalf of the Agency Head.

(e) The term "Contracting Officer" means the individual, a duly appointed successor, or authorized representative who is designated and authorized to enter into contracts on behalf of the Federal agency.

(f) The term "labor standards" as used in this part means the requirements of the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act (other than those relating to safety and health), the Copeland Act, and the prevailing wage provisions of the other statutes

listed in § 5.1 and the regulations in Parts 1 and 3 of this subtitle and this part.

(g) The term "United States or the District of Columbia" means the United States, the District of Columbia, and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States and of the District of Columbia, including corporations, all or substantially all of the stock of which is beneficially owned by the United States, by the foregoing departments, establishments, agencies, instrumentalities, and including nonappropriated fund instrumentalities.

(h) The terms "contract" means any prime contract which is subject wholly or in part to the labor standards provisions of any of the acts listed in § 5.1 and any subcontract of any tier thereunder, let under the prime contract. A State or local Government is not regarded as a contractor under statutes providing loans, grants, or other Federal assistance in situations where construction is performed by its own employees. However, under statutes requiring payment of prevailing wages to all laborers and mechanics employed on the assisted project, such as the U.S. Housing Act of 1937, State and local recipients of Federal-aid must pay these employees according to Davis-Bacon labor standards.

(i) The terms "building" or "work" generally includes construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include without limitation, buildings, structures, and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling blasting, excavating, clearing, and landscaping. The manufacture or fur-

nishing of materials, articles, supplies or equipment (whether or not a Federal or State agency acquires title to such materials, articles, supplies, or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished) is not a "building" or "work" within the meaning of the regulations in this part unless conducted in connection with and at the site of such a building or work as is described in the foregoing sentence, or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project.

(j) The terms "construction", "prosecution", "completion", or "repair" mean all types of work done on a particular building or work at the site thereof (or, under the United States Housing Act of 1937 and the Housing Act of 1949, all work done in the construction or development of the project), including without limitation, altering remodeling, installation (where appropriate) on the site of the work of items fabricated off-site, painting and decorating, the transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor, and the manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work (or, under the United States Housing Act of 1937 and the Housing Act of 1949, in the construction or development of the project), by persons employed by the contractor or subcontractor. However, the term "initial construction" in section 113 of Title 23 U.S.C., which pertains to Federal-aid highway work, does not include repair or maintence work.

(k) The term "public building" or "public work" includes building or work, the construction, prosecution, completion, or repair of which, as defined above, is carried on directly by authority of or with funds of a Federal agency to serve the interest of general public regardless of whether title thereof is in a Federal agency.

(l) The term "site of the work" is defined as follows:

(1) The "site of the work" is limited to the physical place or places where the construction called for in the contract will remain when work on it has been completed and, as discussed in paragraph (l)(2) of this section, other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the "site".

(2) Except as provided in paragraph (l)(3) of this section, fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., are part of the "site of the work" provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and are so located in proximity to the actual construction location that it would be reasonable to include them.

(3) Not included in the "site of the work" are permanent home offices, branch plant establishments, fabrication plants, and tool yards of a contractor or subcontractor whose locations and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial supplier or materialman which are established by a supplier of materials for the project before opening of bids and not on the project site, are not included in the "site of the work". Such permanent, previously established facilities are not a part of the "site of the work", even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

(m) The term "laborer" or "mechanic" includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term "laborer" or "mechanic" includes apprentices, trainees, helpers, and,

in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen or guards. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in Part 541 of this title are not deemed to be laborers or mechanics. Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of Part 541, are laborers and mechanics for the time so spent.

(n) The terms apprentice, trainee, and helper are defined as follows:

(1) "Apprentice" means (i) a person employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or (ii) a person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice;

(2) "Trainee" means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, as meeting its standards for on-the-job training programs and which has been so certified by that Administration.

(3) These provisions do not apply to "apprentices" and "trainees" employed on projects subject to 23 U.S.C. 113 who are enrolled in programs which have been certified by the Secretary of Transportation in accordance with 23 U.S.C. 113(c).

(4) A "helper" is a semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and holding materials or tools; and other related, semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice.

(o) Every person performing the duties of a laborer or mechanic in the construction, prosecution, completion, or repair of a public building or public work, or building or work financed in whole or in part by loans, grants, or guarantees from the United States is "employed" regardless of any contractual relationship alleged to exist between the contractor and such person.

(p) The term "wages" means the basic hourly rate of pay; any contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program; and the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated in writing to the laborers and mechanics affected. The fringe benefits enumerated in the Davis-Bacon Act include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeship or other similar programs; or

other bona fide fringe benefits. Fringe benefits do not include benefits required by other Federal, State, or local law.

(q) The term "wage determination" includes the original decision and any subsequent decisions modifying, superseding, correcting, or otherwise changing the provisions of the original decision. The application of the wage determination shall be in accordance with the provisions of § 1.6 of this title.

§§ 5.3-5.4 [Reserved]

§ 5.5 Contract provisions and related matters.

(a) The Agency head shall cause or require the contracting officer to insert in full in any contract in excess of $2,000 which is entered into for the actual construction, alteration and/or repair, including painting and decorating, or a public building or public work, or building or work financed in whole or in part from Federal funds or in accordance with guarantees of a Federal agency or financed from funds obtained by pledge of any contract of a Federal agency to make a loan, grant or annual contribution (except where a different meaning is expressly indicated), and which is subject to the labor standards provisions of any of the acts listed in § 5.1, the following clauses (or any modifications thereof to meet the particular needs of the agency. *Provided*, That such modifications are first approved by the Department of Labor):

(1) *Minimum wages.* (i) All laborers and mechanics employed or working upon the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR Part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment com-

puted at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics. Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (a)(1)(iv) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in § 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: *Provided*, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under paragraph (a)(1)(ii) of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(ii)(A) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefor only when the following criteria have been met:

(*1*) Except with respect to helpers as defined in 29 CFR 5.2(n)(4), work to be performed by the classification requested is not performed by a classification in the wage determination; and

(*2*) The classification is utilized in the area by the construction industry; and

(*3*) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, agree with the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt or will notify the contracting officer within the 30-day period that additional time is necessary.

(C) In the event the contractor, or the laborers or mechanics to be employed in the classification or their representatives, do not agree with the contracting officer on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt or will notify the contracting officer within the 30-day period that additional time is necessary.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to subparagraphs

(1)(B) or (C) of this paragraph, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(iii) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics include a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(iv) If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, *Provided*, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(2) *Withholding.* The (write in name of Federal Agency or the loan or grant recipient) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the contractor under this contract or any other Federal contract with the same prime contractor, or any other Federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work (or under

the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), all or part of the wages required by the contract, the (Agency) may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(3) *Payrolls and basic records.* (i) Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the

applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(iii) *Equal employment opportunity.* The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR Part 30.

(iv) *Helpers.* Helpers will be permitted to work on a project if the helper classification is specified on an applicable wage determination or is approved pursuant to the conformance procedure set forth in § 5.5(a)(1)(ii). The allowable ratio of helpers to journeymen employed by the contractor or subcontractor on the job site shall not be greater than two helpers for every three journeymen (in other words, not more than 40 percent of the total number of journeymen and helpers in each contractor's or in each subcontractor's own work force employed on the job site). Any worker listed on a payroll at a helper wage rate, who is not a helper as defined in 29 CFR 5.2 (n)(4), shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any helper performing work on the job site in excess of the ratio permitted shall be paid not less than the applicable journeyman's (or laborer's, where appropriate) wage rate on the wage determination for the work actually performed.

(5) *Compliance with Copeland Act requirements.* The contractor shall comply with the requirements of 29 CFR Part 3, which are incorporated by reference in this contract.

(6) *Subcontracts.* The contractor or subcontractor shall insert in any subcontracts the clauses contained in 29

CFR 5.5(a)(1) through (10) and such other clauses as the (write in the name of the Federal agency) may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

(7) *Contract termination: debarment.* A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

(8) *Compliance with Davis-Bacon and Related Act requirements.* All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR Parts 1, 3, and 5 are herein incorporated by reference in this contract.

(9) *Disputes concerning labor standards.* Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR Parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

(10) *Certification of Eligibility.* (i) By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government

contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(iii) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(b) *Contract Work Hours and Safety Standards Act.* The Agency Head shall cause or require the contracting officer to insert the following clauses set forth in paragraphs (b)(1), (2), (3), and (4) of this section in full in any contract subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by § 5.5(a) or § 4.8 of Part 4 of this title. As used in this paragraph, the terms "laborers" and "mechanics" include watchmen and guards.

(1) *Overtime requirements.* No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of eight hours in any calendar day or in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of eight hours in any calendar day or in excess of forty hours in such workweek, whichever is greater.

(2) *Violation; liability for unpaid wages; liquidated damages.* In the event of any violations of the clause set forth in subparagraph (1) of this paragraph, the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each

individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in subparagraph (1) of this paragraph, in the sum of $10 for each calendar day or which such individual was required or permitted to work in excess of eight hours or in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in subparagraph (1) of this paragraph.

(3) *Withholding for unpaid wages and liquidated damages.* The (write in the name of the Federal agency or the loan or grant recipient) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other Federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by

APPENDIX L

CONGRESSIONAL RECORD—HOUSE

H 1526

March 7, 1991

SEC. 303. Notwithstanding any other provision of law, no funds shall be expended by the Secretary of Labor to implement or administer the regulations published at 54 Federal Register 4234-44 (January 27, 1989) to be codified at 1.7(d), 5.2(n)(4), 5.5(a)(1)(ii)(A) and 5.5(a)(4)(iv) of title 29 of the Code of Federal Regulations or to implement or administer any other regulation that would have the same or similar effect. No funds shall be expended by the Secretary of Labor to implement or administer revisions to part 29 of title 29 of the Code of Federal Regulations published at 55 Federal Register 34868-34876 (August 24, 1990) to the extent such revisions affect apprenticeship programs in the construction industry.

AMENDMENT OFFERED BY MR. STENHOLM

Mr. STENHOLM. Mr. Chairman, the first point I ment.

The Clerk read as follows:

Amendment offered by Mr. STENHOLM: page 33, strike out lines 6 through 19.

Mr. STENHOLM. Mr. Chairman, the first point I would like to make is I apologize to my colleagues for being here today: we should not be here. We should not be here taking the House's time at this particular moment.

You know, it is rather ironic because over the last 8 years I have been in this well time and time and time again asking and trying to reform the Davis-Bacon Act. We tried to do it on appropriations bills, and we have been held out of order because you should not legislate

on appropriations bills. We have constantly held to that rule, at least the House has held me to that rule. But now we find that in an appropriations bill the Committee on Appropriations is legislating in an appropriations bill. They should not be doing that.

A little history of why we are here: In September 1982 there was an effort made to change the rules and regulations as they pertain to helpers in Federal contracts. There was an injunction filed in 1982 against this action and it was held up in the courts until just recently when a judge finally made the proper decision in saying this should not be stopped, that the Department of Labor should be allowed to do as the Davis-Bacon Act, which was passed in 1931 and has not been amended by that body since 1935, that the Department of Labor should be able to promulgate regulations to administer the act as it was originally intended in 1931.

Now, lo and behold, we look at the appropriation bill and we find language that has been inserted that says "No, the Department of Labor may not do that which the Davis-Bacon Act allows them to do."

□ 1730

Now the House is going to get a chance to vote on this. I do not want to take a lot of time because we ought not to be discussing this on an appropriation bill. I agree with the chairman and other who have constantly begged us not to do it, but, when members of the appropriations bill do it, then we got to take a little time.

Now we are talking money today, folks. We are talking real dollars. If this amendment is allowed to stand, or if I lost on this amendment, it will cost us $600 million a year every year for the next umpteen years, as it has been costing us in the past. That is the bottom line.

Mr. Chairman, I ask my colleagues to support my amendment. Do as we have constantly said, and maybe we will get a little honesty from all of us. Let us not legislate on appropriation bills. Let us allow the Department of La-

bor to do the job they are supposed to do. Let us allow the consultation that his been going on between labor and the Department of Labor that is this close to an agreement. Let us allow that to happen.

Please join me in striking this. Support my amendment today that strikes this. It will save $600 million a year for the next however many years until we bring this up. And to the appropriate committee, the Committee on Education and Labor, I say "Please bring a bill out on the floor on the House soon so we may deal with this legislation in the proper way."

Mr. WASHINGTON. Mr. Chairman, will the gentleman yield?

Mr. STENHOLM. I yield to the gentleman from Texas.

Mr. WASHINGTON. Mr. Chairman, I thank the gentleman from Texas [Mr. STENHOLM], my colleague, for yielding.

I was looking at the merits of this. I am not on the Committee on Appropriations, so I am not here speaking on the procedure by which the gentleman makes the complaint about it being there, however the provisions which he wants to strike, I think I am not sure if he realizes it does violence to some fledgling programs we have down in Texas by which individuals who otherwise would not be able to get apprenticeship training have been able to do it, and get training and move up to help with jobs that help our Federal responsive projects, and, if I understand his amendment correctly, if this motion to strike is adopted then the DOE regulation, the Department of Labor regulation, go into effect, and that would prevent that from happening.

Is that right?

Mr. STENHOLM. The gentleman from Texas [Mr. WASHINGTON] is not correct, and this is one of the basic points of disagreement between some other information that is floating around. I am talking about letting the Department of Labor process continue on. I am talking about letting them promulgate the regulations. Nothing

have been done as yet. What we are saying is, "Let the process of the law, as it was intended in 1931, proceed. Let the regulations be written. If it turns out that it is as negative as my colleagues suggest that it is, I suggest then that the committee bring legislation back to the floor and correct it legally and legislatively on this floor."

Mr. Chairman, it is not the intent of this author to do harm to any State rules and regulations. I have never intended that, and that is not the intent of my amendment.

The CHAIRMAN. The time of the gentleman from Texas [Mr. STENHOLM] has expired.

(By unanimous consent, Mr. STENHOLM was allowed to proceed for 1 additional minute.)

Mr. WASHINGTON. Mr. Chairman, will the gentleman yield?

Mr. STENHOLM. I yield to the gentleman from Texas.

Mr. WASHINGTON. Mr. Chairman, I want to make sure I have this straight now.

As I understand, unless this amendment stays in, the Department of Labor regulation that has already been promulgated and already been printed in the Code of Federal Regulations will go into effect, and the only way to prevent that is by this provision of section 304.

Am I incorrect?

Mr. STENHOLM. If in fact it has absolutely totally been determined that these regulations, which it is my understanding they have not been finally decided, it is my understanding that it is still in the negotiating stages, and we are not nearly as far apart as it is being suggested today. If my amendment should lose, I can guarantee my colleagues, based on this language, that nothing will happen regarding Davis-Bacon, and we will spend $600 million more this year in this area than we would have if my amendment passes.

Mr. WASHINGTON. Mr. Chairman, I thank the gentleman from Texas [Mr. STENHOLM] for yielding.

Mr. PETRI. Mr. Chairman, I move to strike the last word.

(Mr. PETRI asked and was given permission to revise and extend his remarks.)

Mr. PETRI. Mr. Chairman, I will be brief, but I would just like to say that, as the ranking member of the Labor Standards Subcommittee of the Committee on Education and Labor, that I oppose the Committee on Appropriations essentially legislating within the Committee on Education and Labor's jurisdiction. This dire emergency supplemental appropriation bill is not the appropriate vehicle for reversing regulatory policy, and furthermore, the Labor Standards Subcommittee has not held any hearings on this issue, and to my knowledge this provision was adopted without consulting the chairman of the Labor Standards Subcommittee. I think this is an important policy issue here in this House of Representatives, especially for those of us who do serve on authorizing committees, and, if we do feel that we want an opportunity to do our job, we should be allowed the opportunity to do that rather than see the Committee on Appropriations usurp jurisdiction allegedly because there is some last-minute emergency.

Mr. Chairman, there is in fact not an emergency in this case. Labor unions, members of the Labor Department, have been working and have reached agreement on many of the issues that are supposed to be dealt with by this amendment, and, if they do not reach agreement and there is a problem, why we will have plenty of time to deal with it and in an appropriate fashion in the committee of jurisdiction.

So, I ask my colleagues to support the amendment of the gentleman from Texas [Mr. STENHOLM] so that we can practice good government here in the House and preserve the jurisdiction of the authorizing committee, the Committee on Education and Labor, and other authorizing committees in this body.

Mr. DICKINSON. Mr. Chairman, I move to strike the requisite number of words.

(Mr. DICKINSON asked and was given permission to revise and extend his remarks.)

Mr. DICKINSON. Mr. Chairman, I rise in support of the amendment of the gentleman from Texas [Mr. STENHOLM]. I rise as the ranking member on the House Committee on Armed Services that has fought for years to try to let defense dollars go for defense purposes, which this would tend to do.

While we tend to, in the past have tended to, decrease defend spending, what I am trying to do is say that those dollars that are intended for defense purposes should go for defense purposes.

This amendment would save $600 million a year out of the defense budget. It will in fact be in favor of increased Federal contracting opportunities for small and minority business and in favor of allowing the Department of Labor to do, by regulation, what the courts have said for 5 years that it has the power to do in administering its own rules.

In rising in support of all these things, Mr. Chairman, I am asking my colleagues to strike out a portion of this supplemental appropriation that ought not to have been inserted in the first place. It has no business here.

Now some of our colleagues have expressed doubts that this domestic supplemental appropriation really is an emergency bill, and there are portions of it that should not be considered as emergency. But without a doubt the provisions in the Department of Labor's implementation of its final Davis-Bacon helper regulation does not belong on this floor today.

This provision is no emergency—except to the handful of large contractors and their work forces who specialize in following Davis-Bacon contracts around the country.

This provision is no emergency—except to the privileged few who benefit from $600 million in excess, wasteful, construction spending every year.

This ban on Davis-Bacon helpers is no emergency, has no place in an appropriation, and is no good for the Federal budget.

If it had not been granted a waiver, it would be subject to a point of order because it does not belong here and is not good for the Federal budget. After 9 years of court cases and rewriting, the Department of Labor finally has issued a helper regulation that would wind up saving the $600 million I am talking about when fully implemented. On top of spending the money in this bill, are we going to tell the Labor Department not to save money?

This is the wrong provision and the wrong bill, and certainly this is the wrong time, and I would urge a yes vote on the amendment of the gentleman from Texas [Mr. STENHOLM] to strike this provision that has absolutely no validity in this bill.

Mr. PURSELL. Mr. Chairman, I move to strike the requisite number of words.

Mr. Chairman, we are very supportive of the amendment on this side of the aisle. The Stenholm amendment will delete from the bill the amendment introduced by the gentleman from Pennsylvania [Mr. MURTHA] and which did not go through our Appropriations Subcommittee on Labor, Health and Human Services, and it has bypassed the authorizing committee.

□ 1740

Mr. Chairman, if the Murtha language is not removed, the taxpayers will lose approximately $600 million. We think that the process is inappropriate and we recommend that the Members support the amendment offered by the gentleman from Texas [Mr. STENHOLM].

Mr. Chairman, our new Secretary of Labor, former Congresswoman, Lynn Martin, has written a letter to the chairman of the Rules Committee opposing the Murtha amendment, and I submit that for inclusion in the RECORD at this point, as follows:

DEPARTMENT OF LABOR,
Washington, D.C. March 6, 1991.

HON. JOSEPH MOAKLEY,
Chairman, House Rules Committee, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: It is my understanding that the Rules Committee will be meeting this afternoon to consider the nature of the rule governing House debate on H.R. 1281, the "Dire Emergency Supplemental." This letter is to express the Administration's strong objection to a Murtha amendment which was accepted yesterday by the House Appropriations Committee in its consideration of H.R. 1281. The Murtha amendment would prohibit the Department of Labor from expending funds to administer regulations governing the use of semi-skilled helpers on federally financed and assisted construction contracts subject to the Davis-Bacon and Related Acts (DBRA). (These regulations went into effect on February 4, 1991.) It would also enjoin the Department from promulgating final regulations pertaining to revisions to the apprenticeship programs in the construction industry.

I oppose this amendment and its purposes. I also oppose legislating substantive labor policy in an appropriations bill. An appropriations bill is not the appropriate vehicle for introducing significant reversals in established governmental policies. For these reasons, I am asking that the Committee agree to a rule that provides for an "up or down" consideration of the Murtha language on the House floor.

The issues underlying the DBRA regulations have been examined extensively over the past decade, and the Department's authority to implement them has been sustained through the courts. The objections to these regulations were considered in the courts and were rejected. The helper regulations reflect a longstanding position of the Executive Branch over the last decade.

These regulations set no government-imposed constraints or conditions on construction contractors or construction

workers. The employment of helpers is permitted only when their use is the prevailing practice in an area. The regulations do place limits on the ratio of helpers to journeymen to prevent abuses—their use is limited to two for every three journeymen.

Permitting the use of helpers, according to local industry practices, will:

Provide increased job opportunities for semi-skilled workers and encourage their use in a manner which provides training;

Update outmoded practices under Davis-Bacon to more accurately reflect widespread industry practices thereby enhancing private sector competition on Federal construction projects;

Save the Federal government a substantial amount in construction *labor costs* (estimates to be at least $500 million in FY 1992).

The proposed revisions to the regulations governing the Department's registration of traditional apprenticeship programs were published after two years of research, review, and discussion in an open and public debate on the issues. The purpose was to streamline and update these regulations as part of an overall Departmental program to expand apprenticeship to additional occupations and industries and to maintain and improve the quality of *all* apprenticeship programs. These regulations would require State Apprenticeship Councils to promptly advise a sponsor of a proposed apprenticeship program of a decision on the sponsor's requests and furnish an explanation of the decision in the event of a denial. In addition, there would be the right of appeal to the Department of Labor if the request was denied.

The changes proposed in the revised regulations are intended to reduce subjectivity and the opportunity for bias in determining conditions for program registration and in the monitoring of programs. Background information on the helper regulations is enclosed.

When put in place, these revised regulations will:

Ensure that all registered programs meet consistent, *high quality standards;*

Ensure that all potential programs sponsors are treated fairly by setting up a Departmental appeal process;

Establish a uniform Federal standard for registering apprenticeship programs, with allowances for State flexibility for specific State purposes.

In addition, I would point out that these regulations are still in proposed form. We will keep the Congress informed as the rulemaking proceeds.

For the foregoing reasons, the Administration asks that the Rules Committee would grant a rule which allows for the "up or down" consideration of the Murtha amendment.

The office of Management and Budget advises that there is no objection to the transmittal of this letter from the standpoint of the President's program.

Sincerely,

LYNN MARTIN,
Secretary of Labor.

Mr. FORD of Michigan. Mr. Chairman, I move to strike the requisite number of words, and I rise in opposition to the amendment offered by the gentleman from Texas [Mr. STENHOLM].

(Mr. FORD of Michigan asked and was given permission to revise and extend his remarks.)

Mr. FORD of Michigan. Mr. Chairman, the Stenholm amendement would delete from the pending supplemental appropriations bill the Murtha amendment, which prohibits the Secretary of Labor from implementing two sets of regulations threatening to undermine important standards for the protection of workers in the building and construction trades throughout the Nation.

These prohibited regulations are, first, the newly effective Davis-Bacon regulations regarding helpers and, second, the proposed regulations making changes in the operation in the National Apprenticeship Program af-

fecting the construction industry. Neither of these regulations, which the Murtha amendment as adopted by the Appropriations Committee would hold in abeyance, has been properly considered and approved in the legislative process.

As chairman of the Eduction and Labor Committee, I am strongly opposed to the administration's unilateral promulgation of such major regulations in the absence of legislation authorizing substantive changes in these programs.

The Davis-Bacon regulation, which took effect on February 4 of this year, would allow contractors carrying out federally assisted public works and construction projects subject to the Davis-Bacon Act to assign work previously performed by journeymen or laborers to a lower-wage classification of "helpers".

Collective bargaining agreements usually include within the classification of laborers those workers who perform helping or tending duties. Like other laborers, they receive prevailing wage rates and fringe benefits. The Labor Department's new regulations will allow prevailing wage determinations to be made separately for a newly recognized classification of helpers, who would not be covered by the prevailing wage rate and fringe benefit protections available to laborers.

The expanded helper regulation will have the effect of eliminating the longstanding requirement that has permitted Davis-Bacon contractors to pay reduced wages to unskilled workers only if they are registered as apprentices in a Federal apprenticeship and training program or an aproved State apprenticeship program. Under the new regulations, helpers would not be assured of the training that they need to enhance safety and productivity on the work site.

The new Davis-Bacon regulations recognize a category of helpers who are not journeymen mechanics or laborers, and who are not apprentices or trainees, the classifications for which Davis-Bacon determinations have been made for half a century.

Under these regulations, contractors who employ workers in the helper category at lower wages and benefits, but do not register them as apprentices, will reduce their costs to the detriment of these workers and thereby have an unfair advantage in bidding for federally assisted public works and construction projects.

This kind of fundamental change in the program's framework should be addressed only in the context of Davis-Bacon authorization legislation.

The Education and Labor Committee reported out legislation in the 10th Congress which addressed a variety of Davis-Bacon issues, including the definition of helpers. That legislation was adopted on the House floor as a part of the Defense authorization bill. No Davis-Bacon amendments were finally agreed upon in the joint House-Senate conference.

Congress should insist that the administration recognize that authorizing legislation is the only appropriate vehicle for dealing with fundamental changes in the operation of the Davis-Bacon Act. I support the Murtha amendment because it protects the legislative prerogative in this important area.

The proposed regulations regarding programs under the National Apprenticeship Act are still under review in the administration, after an extensive public comment period. Nearly 60,000 comments opposing the regulations were received by the Department.

Although the Labor Department has not settled upon the final contents or an effective date for these regulations, there are disturbing provisions in the proposed regulations which have been brought to the attention of many Members of Congress.

The major controversy concerns the Labor Department's proposal to provide interstate portability of apprenticeship program registration. The approval of an apprenticeship program in a State would automatically permit a sponsor to operate in another State for up to 6 months without obtaining approval from the second State where it would like to operate.

Employers with programs meeting lower standards in one State would be encouraged to operate in States where they would not meet higher apprenticeship standards. The need for this portability proposal is not clear, in view of the experience that many multi-State contractors are now meeting standards in each State in which they operate.

The construction industry apprenticeship program in this country has generally been highly effective, a model for the world. The Murtha amendment would simply prohibit the implementation of the proposed apprenticeship regulations as they affect the construction industry.

It is my position that those who advocate changes in the National Apprenticeship Program should demonstrate the need and justification for major operational changes in the proper legislative forum. The administration has not submitted a legislative proposal to the Education and Labor Committee. I believe that regulations arousing the controversy that these apprenticeship regulations have stimulated should be withdrawn.

I support the Murtha amendment in this bill because it would assure that these Davis-Bacon and apprenticeship regulations will not be permitted to take or remain in effect, in the absence of the proper approval in the course of legislative consideration.

For these reasons, I ask that the Stenholm amendment be defeated and that the Murtha amendment be retained in this supplemental appropriations bill.

Mr. GUNDERSON. Mr. Chairman, I move to strike the requisite number of words.

(Mr. GUNDERSON asked and was given permission to revise and extend his remarks.)

Mr. GUNDERSON. Mr. Chairman, I know that we all want to vote and we want to end the day and end the week and go home, but I think we have to understand exactly what is going on here this afternoon.

We have two sets of regulations. One set of regulations deals with Davis-Bacon, and the other set of regulations deals with apprenticeship. The Davis-Bacon regulations

have been litigated in courts, and the courts have ruled that every one of those regulations is valid. I cannot help it if you do not like the ruling of the courts, but that is what has happened.

On the apprenticeship regulations, they have been in negotiation, and the fact is that last week organized labor in this country resolved almost every bit of the differences in the proposed regulations with the Department of Labor. We are all well aware that this week the Department of Labor has been up here meeting with congressional staff to further discuss those proposed regulations.

These are only proposed. This is the first phase, the public hearing phase, as the distinguished chairman of the Committee on Education and Labor said, and this is the time for comment. But are we all going to decide here today that we are not going to allow the normal rulemaking process to go forward if there is by chance the possibility that there is something in those regulations that maybe we do not like? Is that the way we are going to legislate? Are we going to legislate that way in an appropriations bill?

This is the wrong provision. This amendment is in the wrong bill. It does not belong in an appropriations bill. If there are problems with Davis-Bacon and problems with the apprenticeship rules, then we should bring legislation up here to deal with them. But it is the wrong time. It is the wrong time because the regulations process is not complete. It is the wrong time because the Department of Labor has been bargaining in good faith with organized labor to resolve this, and now we are going to come in here and cut them off at the knees.

The fact is that we have regulations in here that are 17 years old. They have not been changed for 17 years. The process of updating and modernizing those regulations makes all the sense in the world, and are we going to take a dire supplemental appropriations bill and use that as a tool because we know that train must go? Are we going to do something like this? That is

not good public policy, and worse than that, it is not a good legislative process.

Mr. STENHOLM. Mr. Chairman, will the gentleman yield?

Mr. GUNDERSON. I am happy to yield to the gentleman from Texas.

Mr. STENHOLM. Mr. Chairman, I thank the gentleman for yielding.

Mr. Chairman, I would just like to respond to the statement of the chairman of the Committee on Education and Labor of a moment ago and again remind my colleagues that we are here today because these regulations that were proposed in 1982 were stopped by an injunction. The individuals who differ with whether the regulations ought to be written or not written today have had a judge look at them, and let me read what the judge has said regarding the Davis-Bacon item:

Vacating the injunction, Judge Harold H. Green stressed that the Davis-Bacon Act gives the Secretary of Labor authority to determine prevailing wages in the broadest terms imaginable. Accordingly, the court said a review of the Secretary's decisions should be only to ensure that regulations are consistent with the purpose of the statute and are not arbitrary.

The arguments the chairman was making have already been looked at by a judge, and it was said that the orignal intent of the act that has not been amended since 1935 is in fact still being carried out, but there are still protections if in fact these regulations are arbitrary. And that is not anything my amendment is getting into.

The CHAIRMAN. The time of the gentleman from Wisconsin [Mr. GUNDERSON] has expired.

Mr. FORD of Michigan. Mr. Chairman, I ask unanimous consent that the gentleman from Wisconsin be granted 3 additional minutes, and I will ask him to yield to me.

The CHAIRMAN. Is there objection to the request of the gentleman from Michigan?

Mr. McDADE. Mr. Chairman, reserving the right to object, I am not going to object, but I would just like to try to see at this point if we can get a sense of how many more speakers there are on this issue and see whether or not we can agree on a limitation.

Mr. FORD of Michigan. Mr. Chairman, if the gentleman will yield, my sense is that we are at the end.

Mr. McDADE. I am sorry, I did not hear the gentleman.

Mr. FORD of Michigan. Mr. Chairman, the reason I am doing this is that my sense is that we are at the end of it.

Mr. McDADE. Are there more speakers?

Mr. FORD of Michigan. If the gentleman pops up with one, one will pop up over here, but after that I think we are through.

The CHAIRMAN. Is there objection to the request of the gentleman from Michigan?

Mr. VALENTINE. Mr. Chairman, I would just like to make a request by unanimous consent. I rise in support of the amendment.

The CHAIRMAN. There is already one unanimous-consent request pending, that request being for the gentleman from Wisconsin to be granted 3 additional minutes.

Mr. McDADE. Mr. Chairman, further reserving the right to object, may I suggest, if we are close to a vote, that we get unanimous consent that all debate close in 5 minutes.

The CHAIRMAN. Does the gentleman from Michigan [Mr. FORD] withdraw his first unanimous-consent request?

Mr. FORD of Michigan. No, Mr. Chairman, I asked to get 3 additional minutes for the gentleman from Wisconsin.

The CHAIRMAN. Then the Chair will put the question again.

Is there objection to the request of the gentleman from Michigan that the gentleman from Wisconsin [Mr. GUNDERSON] be granted 3 additional minutes?

There was no objection.

□ 1750

Mr. FORD of Michigan. Mr. Chairman, will the gentleman yield?

Mr. GUNDERSON. I will be happy to yield to the gentleman from Michigan.

Mr. FORD of Michigan. The actual history the gentleman partially reported to Members is in 1981 the Reagan administration proposed the same regulation we are talking about here. The U.S. court held that that was an illegal attempt to, by regulation, amend the Davis-Bacon Act.

In 1982, the district court held that the helper rule violated the Davis-Bacon Act, and sent it back in 1983 to the Labor Department and said, go back to the drawing board and recognize the existence of the definitions in the act as we have interpreted them in the past, and rewrite it.

In 1987 the Labor Department issued a second proposed helper regulation. In 1989 the helper regulation was published as final and submitted to the U.S. district court for approval. In 1990, the U.S. district court lifted its injunction, that had been there ever since 1981, clearing the way for the Labor Department to implement the helper rule. However, that case is on appeal.

Now, I do not know if you want to have these things go to the courts, and then let the executive branch go forward. It does not show good faith to me on the part of the people over at the Labor Department. I have not had a chance to talk to the Secretary about this. I do not think she will aprove of it.

Mr. GUNDERSON. Mr. Chairman, reclaiming my time, two things: First of all, if you are concerned about regulations going to the courts, if you are concerned about the outcome of the courts, then let us take a good look next week at the civil rights bill, where we are opening up civil rights laws to the courts for the first time in the history of the country.

Second, and this is the argument that every Member on this floor, Republican or Democrat, ought to understand. Lynn Martin has been the Secretary of Labor for 1 week. One week. Now do you think it is fair and proper conduct for this House of Representatives to come here and to undercut her ability to review these regulations and to propose final regulations, with only 1 week on the job? We are all fairer than that. We all apply to a higher standard of conduct than that.

Support the amendment of the gentleman from Texas [Mr. STENHOLM].

Mr. McDADE. Mr. Chairman, I want to make sure we are closing debate. If not, I want to renew my unanimous consent that all debate end now.

Mr. VENTO. Mr. Chairman, I object.

The CHAIRMAN. Objection is heard.

Mr. VENTO. Mr. Chairman, I move to strike the requisite number of words.

(Mr. VENTO asked and was given permission to revise and extend his remarks.

Mr. VENTO. Mr. Chairman, I rise in opposition to the Stenholm amendment, which would eliminate the provision of the bill added in the Appropriations Committee by Mr. MURTHA, which prohibits the Department of Labor from expending any funds to implement proposed new regulations which would permit the expanded use of helpers on federally funded or federally assisted construction projects.

On August 24, 1990, the Labor Department published proposed new regulations which would lower the standards of all apprenticeship programs, including those in the construction industry. The Labor Department justifies these proposed new rules on the basis that they are intended to promote the development of apprenticeship programs in nontraditional industries and to serve the needs of apprentices. A closer reading of the proposed new rules, however, reveals that, in fact, they would serve wholly the convenience and benefit of contractors and not the apprentices enrolled in the program.

For example, the portability provision in the Department's proposed rules would allow a contractor from one State who meets the new proposed Federal standards to automatic certification in any other State for up to 6 months. While this change would obviously give contractors greater flexibility in moving apprentices across State lines, it does not necessarily serve the interests of the apprentices in training since there is no requirement that a contractor hire any local apprentices in another State which he enters and since there is no requirement that he retain those apprentices from his own State who he brings into work in another State.

Furthermore, the portability changes proposed in the new rules can roughshod over State apprenticeship programs in Minnesota and many other States thus circumventing State efforts across the Nation. The proposed new rules will effectively preempt the ability of State apprenticeship agencies to establish program standards that are higher or are in any way different than a set of minimum Federal standards.

In Minnesota, we know from firsthand experience what can happen when an out-of-State contractor comes in from another State with very different labor standards and practices and runs roughshod over local workers and apprentices.

The proposed new rules also eliminate journeymen-to-apprentice ratios. This change will undoubtedly reduce the quality of the job-training component of all apprenticeship programs and will also adversely affect job safety.

The proposed elimination of the minimum 144 hours of annual instruction in the proposed rule will reduce construction program quality in the building trades and will also lower the level of training provided to apprentices in nonconstruction apprenticeship programs. Simply increasing the minimum term of an apprenticeship to 2 years, except for competency based programs where the term may be an even shorter duration of only 18 months

doesn't suffice for the lost training requirements. How do such changes work to the benefit of apprentices who are promised a quality training experience? The answer is that they do not.

On October 19, 1990, I wrote to then-Secretary of Labor Elizabeth Dole, and was joined by 105 other Members of the House, expressing our opposition to these proposed changes and requesting that the proposed regulations be withdrawn. Indeed, it is my understanding that the Department of Labor has received thousands of comments criticizing these proposed new rules since they were first published in the Federal Register in August 1990.

On March 1, I hosted a congressional briefing at which Mr. Jim Van Erden, Administrator of the Office of Work-Based Learning, and Mr. Tony Swope, Director of the Bureau of Apprenticeship and Training, responded to some of our concerns regarding these proposed regulations. At that time, these Labor Department officials indicated that they were aware of many of the concerns which have been expressed and that they were working with interested parties to revise the proposed rules. That being the case, there should be little objection to the provision included in committee by the gentleman from Pennsylvania [Mr. MURTHA] which simply prohibits the Department from expending any funds to implement these regulations, which the Department concedes are flawed.

I hope that my colleagues will join me in rejecting the Stenholm amendment to delete the Murtha provision from the bill.

Mr. MURTHA. Mr. Chairman, I move to strike the requisite number of words, and I rise in opposition to the amendment.

Mr. Chairman, I insert the following letter from the AFL-CIO:

AMERICAN FEDERATION OF LABOR AND CONGRESS OF ORGANIZATIONS,

Washington, DC, March 7, 1991.

Hon. JOHN P. MURTHA,
House of Representatives, Washington, DC.

DEAR REPRESENTATIVE MURTHA: The AFL-CIO supports your amendment to H.R. 2181, the Dire Emergency Supplemental Appropriations bill for FY 1991 which forbids the Labor Department from expending funds to implement helper and apprenticeship regulations which adversely affect workers. For almost ten years, both the Congress and the courts have stood fast against these proposed regulations.

As you know, the Labor Department in 1981 proposed a new category of "helper" designed to create a class of workers who, unlike laborers, would work with no formal training and no hope of advancement within the construction industry. The Davis-Bacon Act requires prevailing wages for "laborers and mechanics" on federal and federally-funded construction projects; "mechanics" are journeymen.

Under the regulations, "helpers" will receive no formal training and will become a permanent underclass of workers at very low wages. The result would be to severely reduce the level of employment for laborers, who are in large part minority workers. If the regulations were implemented, fully 40% of the Davis-Bacon work force would be eliminated just as the number of minorities and women are increasing in the industry, their wages would be slashed or their jobs eliminated.

In 1983, the U.S. Court of Appeals struck down the 1981 helper regulation, ruling in part that it undermined the Davis-Bacon purpose that Federal projects mirror local practices, and the court enjoined enforcement of the regulation.

The changes being brought about by the regulations are those that the Congress has repeatedly rejected. Moreover, Congress has both repeatedly extended the

Davis-Bacon Act and refused to repeal or "water down" the statute.

The Labor Department has also proposed a regulation to disrupt the long-standing operation of apprenticeship programs. The regulation would abolish state apprenticeship councils of employer and employee groups which exist in 26 states and the District of Columbia.

Furthermore, the regulation would abolish ratio requirements of apprentices to journeymen, leaving an unenforceable apprenticeship system. The Labor Department cannot enforce every employer's apprenticeship program without an established ratio.

The regulation would also allow out-of-state contractors to disrupt local apprenticeship training programs by bringing in an unlimited number of out-of-state apprentices.

The AFL-CIO strongly supports your Amendment and we urge you and your colleagues to vote down any motion to strike it from the Supplemental Appropriation.

Sincerely,

ROBERT M. MCGLOTTEN,
Director, Department of Legislation.

Mr. VALENTINE. Mr. Chairman, I move to strike the requisite number of words.

(Mr. VALENTINE asked and was given permission to revise and extend his remarks.)

Mr. VALENTINE. Mr. Chairman, I rise in support of the amendment offered by the gentleman from Texas [Mr. STENHOLM]. He and I, and many others in this House, have long pushed for real reform of the outdated, obsolete Davis-Bacon Act. It is not fair to those of us who have invested much time and study in Davis-Bacon to be surprised by the revelation that a significant, nongermane legislative provision was slipped in this appropriation bill in committee.

Despite previous consideration of Davis-Bacon in this House, this provision has never been openly debated.

And every other significant Davis-Bacon provision to come to the floor in the last decade—whether already in a committee bill or in a floor amendment—and whether proposed by Davis-Bacon reformers or apologists—has come with an opportunity to full debate and an opportunity for the other side to offer an alternative.

This is a Davis-Bacon stealth attack Mr. Chairman. It has been carried out this way because some supporters of the old Davis-Bacon regime do not trust the outcome of this debate to the democratic process.

In 1988, we came within six votes of passing a Stenholm-Dickinson amendment significantly stronger than the partment of Labor regulation this bill blocks. In 1989 we lost by only 22 votes an attempt to defeat an expansion bill.

This is a close issue in the House, and I am disappointed that a few persons would rather attach a rider to a supplemental appropriation than revisit the issue in an open, deliberative manner.

I want to revisit the issue again, but I want to do it when we also have a chance to vote on repeal or reform of the archaic Davis-Bacon Act of 1931. I do not think it is fair, with virtually no notice, to be forced to fight a defensive action against a sneak attack to protect a regulation the Secretary of Labor has had every right to issue.

For these reasons, I ask that we adopt the Stenholm amendment today and set the stage for a real Davis-Bacon debate later in this Congress.

Mr. RAY. Mr. Chairman, I move to strike the requisite number of words.

(Mr. RAY asked and was given permission to revise and extend his remarks.)

Mr. RAY. Mr. Chairman, I rise in support of the amendment offered by my friend from Texas, Mr. STENHOLM.

The House has openly debated the issue of Davis-Bacon reform in the last few years, usually as a part of

the Department of Defense authorization bill. The debate has been thoughtful and the votes have been close. I believe it is proper to consider Davis-Bacon reform in the context of an authorization bill.

Unfortunately, this issue is now being debated because the Appropriations Committee attached a rider to the supplemental appropriations bill which would prevent the Department of Labor from implementing their modest regulations regarding construction helpers. The courts have held that the Department of Labor has the power to issue regulations which allow the use of semiskilled helpers on Federal construction projects. These regulations are consistent with the Davis-Bacon Act.

Mr. Chairman, these regulations do not need to be addressed through this rider on a supplemental appropriations bill. I encourage my colleagues to support the Stenholm amendment and delete the language in the bill.

Mr. BALLENGER. Mr. Chairman, I move to strike the requisite number of words.

(Mr. BALLENGER asked and was given permission to revise and extend his remarks.)

Mr. BALLENGER. Mr. Chairman, I rise in support of the Stenholm Davis-Bacon amendment.

This proposal simply strikes a paragraph in the emergency supplemental that should not be there—a nongermane legislative provision in an appropriation bill that prevents the Department of Labor from proceeding with the new Davis-Bacon helper rule.

The House has debated Davis-Bacon issues several times over the last few years, resulting in several very close votes. Now, an attack has been launched, with a paragraph secretly attached to this appropriation bill that is actually substantial legislation.

The Department of Labor began the process of writing a Davis-Bacon helper rule in 1981. While none in Congress attempted to block it, labor took it to court in 1982. Our legal system cleared the way for a revised regulation in 1985. The Department has further refined the helper rule.

The helper rule has been tested in Federal court every step of the way, including a final determination about a month ago. There is no conceivable reason to hold it up.

There is another reason to support the Stenholm amendment. Simply put, this amendment saves the Federal Government $600 million in wasteful spending. With the Federal deficit topping $300 billion, it's about time we start cutting spending rather than looking for ways to spend more.

The helper ban in this bill amounts to a major and expensive rewrite of the Davis-Bacon Act. Tucking it away almost out of sight, hoping no one will notice, is not a responsible way—nor a fair way—to legislate.

I'm perfectly willing to debate all the issues surrounding the Davis-Bacon Act; unfortunately, this is not the time or the place. Join me in supporting the Stenholm amendment.

Mr. WASHINGTON. Mr. Chairman, I move to strike the requisite number of words.

(Mr. WASHINGTON asked and was given permission to revise and extend his remarks.)

Mr. WASHINGTON. Mr. Chairman, the construction industry currently has a recognized category of workers who perform helper or tending duties. These are construction laborers. The so-called helper that the gentleman from Texas claims should now be utilized on Federal construction is nothing more and nothing less than a construction laborer—except that the new helper is untrained and receives no fringe benefits such as health care or pension contributions. The economics of replacing trained laborers who currently receive health benefits and a decent wage are quite questionable.

But let me also point out that construction laborers are the largely minority and female component of the construction work force. So if the new helper class is now used, what is the impact on the minority and female portion of the construction work force? It is simple. Their wages are cut and they lose health care coverage.

In 1989, the recognized and formal training programs of construction laborers were composed of 40 percent minority and female workers. The rate at which laborers are currently being trained demonstrates the manner in which the helper regulation will have a particular and immediate adverse impact on the employment of minority and female laborers. Under the auspices of the Laborers-Association General Contractors education and training fund, a jointly sponsored labor management training fund, there were 31,913 construction laborers who received formal training in 1989 from 73 local training funds throughout the United States. Forty percent of these labor trainees were minorities and women.

It is these very workers who face a reduction in wages and fringe benefits if the helper rule goes into effect.

If contractors can now simply reclassify these minority and female laborers as helpers and cut their wages and eliminate their fringe benefits, what can possibly be gained from an economic point of view. Also, the social costs will be enormous. It is wrong headed and I urge you to vote against the motion to strike.

Mr. WILLIAMS. Mr. Chairman, I move to strike the requisite number of words.

Mr. Chairman, I want to be sure that Members understand how you save money under this regulation. There is no doubt you save it. You save it by the hundreds of thousands of dollars very quickly, and you save it one way. You reduce the wages of American workers. That is the only way that there is any money saved here.

Mr. Chairman, if you vote for the Stenholm amendment, you are voting to reduce the wages of American workers. Yes, that is a savings.

Now, there are other ways to get savings in this country besides reducing the standard of living of American workers. A vote for the Stenholm amendment reduces the standard of living for American workers building plants and equipment and designing material for the Government of the United States. A vote against the

Stenholm amendment at least attempts to keep the standard of living for American workers where it is now.

Mr. FAWELL. Mr. Chairman, I move to strike the requisite number of words, and rise in support of the amendment.

Mr. Chairman, it seems to me we ought to understand that for about 8 years now the Department of Labor has been trying as best they can to implement what all of the construction trades and private industry recognize, and that is when you have the classification of helper, you can (once in a while) pick up a tool, for instance, without having to be paid as though you were a journeyman. It is just that simple aspect that we really are talking about.

Mr. Chairman, as far as minorities are concerned, they wish to be able to get into the construction trades. The way to do that is to emulate the private sector. You come in as a helper. You help a carpenter or you help in painting, and you are able to pick up a hammer once in a while. You are paid a fairly good rate there as a laborer, but not as a journeyman.

Anyway, we are not even settling that issue here. We are saying to the Secretary of Labor, you can continue on this particular course. If some people have objections, they can file the objections. I suppose we can have litigation for another 8 years. But the people of this country are recognizing that we are just blowing away $600 million because we are not able to utilize the regulation process.

It makes no sense for this Congress to continue to be indifferent about saving money especially when you have Federal construction projects that can be operated on the prevailing wage rate in the locality and within the prevailing job classifications in the locality. That is what the Davis-Bacon Act is all about—to guarantee that the prevailing wage rate and the prevailing job classifications will prevail. Here we are fighting and fighting, so that we cannot intelligently address it, and we tell the

new Secretary of Labor that she cannot continue on what has been an 8-year march. I think that is ridiculous.

Once again, the whole country is watching us as we are indifferent. We are not cutting wages. We are trying to open up the trades so that young people and minorities and others can learn the trades and learn how to be a plumber or a painter. We are not taking money out of peoples' mouths, we are giving them opportunities.

So I support the Stenholm amendment. It is common sense. The Secretary of Labor and the regulatory process hopefully someday will come to an end.

Mr. Chairman, I cannot understand why in the world we cannot have a job classification recognized by Davis-Bacon, if it is a prevailing job classification in a locality where the construction is taking place. That is all we are talking about. A few unions do not like it. They want everybody who comes in, even if they are going to do helpers' work, to get paid as much as a plumber or a painter. That means any construction job which is federally funded or assisted with Federal funds, including local projects which are assisted with Federal funds, will cost millions and millions of dollars more.

Mr. Chairman, that is wasting the money of the taxpayer. I apprise Members once again the deficit this year will be $318 billion, not counting what we borrow from trust funds.

Mr. PERKINS. Mr. Chairman, I move to strike the requisite number of words.

I apologize to Members for speaking. I know the hour is late and we all want to move on. I cannot let myself let that last speech go unanswered.

Mr. Chairman, I am chairman of the subcommittee that has jurisdiction over the Apprenticeship Program. The Helper Program is in another area. I can truthfully say that this is a change in a policy that has basically controlled this program for 44 years. This is being done by the backdoor of regulation. It is not going through the appropriate channels. All that the gentleman from Penn-

sylvania [Mr. MURTHA] is attempting to do with this particular amendment is maintain the status quo. That status quo has given us an Apprenticeship Program that has a proper ratio of journeymen to apprentices of 2 to 1, that has a portability provision that prevents people from tranferring from one section of the country to another and giving credit, despite the training they have received, that allows States to basically run their own programs, as 26 States have standards this will do away with.

□ 1800

So I seriously think that before Members are too misguided about what is going on today, they should realize that this is a change that is going through the back door, and what we are asking today is for a full and fair hearing through the appropriate jurisdiction, the Education and Labor Committee, to actually produce some sort of policy decision.

Mr. WASHINGTON. Mr. Chairman, will the gentleman yield?

Mr. PERKINS. I yield to the gentleman from Texas.

Mr. WASHINGTON. Mr. Chairman, I was trying to get my friend from Illinois to yield and I think he forgot and sat down, but am I correct, like down in the State of Texas, specifically in Houston where I am from, we have had a hard time getting certain individuals to participate, to be able to get into these apprenticeship programs, and what I want to do, and the reason I oppose the Stenholm amendment, is the way I read it and the way I read what the regulations do is that they would allow companies from out of State to come in and circumvent the process we have set up by which 40 percent of the apprenticeship jobs are now being held by women and minorities, and bring in people from other States. Am I correct or incorrect?

Mr. PERKINS. I think the gentleman is absolutely correct. Women and minorities would be deeply affected under this proposal.

Mr. GUNDERSON. Mr. Chairman, will the gentleman yield?

Mr. PERKINS. I yield to the gentleman from Wisconsin.

Mr. GUNDERSON. I appreciate the gentleman yielding for two reasons. I want to comment both to your statement and that of the gentleman from Texas.

It is our understanding that the proposed regulation will make it easier, not harder, but easier to enter the apprenticeship program. I think that we ought to review and understand that before we make this kind of a legislative change.

But I want to ask the gentleman from Kentucky, am I not correct that last week organized labor met in Baltimore with the Department of Labor and came to a general consensus on the regulations for the apprenticeship program?

Mr. PERKINS. I am not familiar with any sort of action that has taken place along those lines, so I truly cannot comment.

Mr. VENTO. Mr. Chairman, will the gentleman yield?

Mr. PERKINS. I am pleased to yield to the gentleman from Minnesota.

Mr. VENTO. Mr. Chairman, I thank the gentleman for yielding.

Mr. Chairman, as late as last Friday we had a meeting. I did, under the auspices of Chairman FORD with the Department of Labor and various staff. One hundred Members last year signed a letter, as the gentleman maybe knows, against the proposed regulations, and the Department of Labor representatives that were there, and the Labor people at that meeting gave no indication that there was any agreement at this time. There was agreement on some points, but the major provisions that were pointed out here with regard to affordability and with regard to the number of aprentices for journeymen, there is no agreement.

The only way I believe, and that is why I oppose the Stenholm amendment and support the Murtha amendment, the only way we are going to get that issue resolved is if we prevent these from going into effect. I think while there may be general agreement down the road, I do not think we want it with a hammer at our head.

Mr. PERKINS. Reclaiming my time, that of course was my understanding as well. I was not familiar with any changes.

Mr. GUNDERSON. Mr. Chairman will the gentleman yield?

MR. PERKINS. I yield to the gentleman from Wisconsin.

Mr. GUNDERSON. Mr. Chairman, I appreciate the gentleman yielding.

First of all, let everybody understand they are proposed regulations, they are not final, and they are in the public hearings process.

Second, it is still our understanding and the Department of Labor's understanding that there was an agreement in Baltimore on those regulations, and that is why I think many people are very upset with this section happening in this bill at this time when there has been negotiation in good faith, and it is the Department's understanding they have reached an agreement. It they have not over a couple of items, then we ought to go back and deal with that. If that all fails, legislatively we solve it later. But do not prevent the normal process from working, and that is what is happening this afternoon.

Mr. PERKINS. Reclaiming my time, as I say, I am not familiar with any agreement, nor as the gentleman from Minnesota indicated has our side understood there is such an agreement.

Mr. GOODLING. Mr. Chairman, I move to strike the requisite number of words.

Mr. Chairman, I just want to correct something that was said just in the last debate and discussion. One

would have thought that if the regulations go into effect, somehow minorities are going to be hurt by that. The opposite is positively true.

At the present time you can be denied an apprenticeship if they do not like the way you comb your hair, if they do not like the color of your skin, if they do not like anything about you and you cannot, you cannot appeal that decision. That is final.

The regulations would give them the opportunity, as a matter of fact, to appeal the decision that was made, which was probably a discriminatory decision in the first place.

Mr. KOLTER. Mr. Chairman, I rise in strong support of the full provisions of the Davis-Bacon Act of 1931. The famous act requires that the minimum wage rates paid to each separate classification of worker, on federally financed construction, repair, and alteration contracts, be those determined to be locally prevailing by the Department of Labor.

As my colleague, Mr. STENHOLM, has indicated, the Davis-Bacon Act was, indeed a much needed response to unscrupulous, fly-by-night contractors, hauling gangs of itinerate, cheap, bootleg labor around the country to undercut local firms on Federal public works projects at a time when there was little other new construction.

But if we weaken Davis-Bacon now, surely these terrible past practices will return.

Mr. Chairman, we are currently in a precarious time of little or no new construction. We are again in a dismal time of limited employment opportunities and limited business opportunities. If we harm the Davis-Bacon Act now, we will without a doubt return to the same unscrupulous fly-by-night gang labor that needed stopped by Davis-Bacon in 1931.

Today, make no mistake, we have hard, uncertain economic times throughout America and the world. Any weakening now in the labor laws will invite all manner of ruthless new hiring practices.

For example, one problem might be created because immigrant labor is anxious to obtain employment on our shores. Many desperate peoples of the world, whose labor has been shackled in their own lands, would understandably be more than willing to earn a few dollars in this free nation where they have been told the streets are lined with gold. We know through hard experience, that there are—unfortunately—exploiters here on our own shores, who will not hesitate to reshackle these new American workers.

Therefore we cannot allow the slow and systematic destruction of our labor laws and the hard-earned wages of this Nation's labor. The great social contribution of the 20th century has been a fair wage for a full day's work, with a definite and legislated minimum.

We must not be prepared to throw this hard-won legislation to the wind. We must fight here in the Halls of Congress and stand behind the American worker by opposing the amendment of the gentleman from Texas [Mr. STENHOLM] and by supporting the amendment of the gentleman from Pennsylvania [Mr. MURTHA].

The Stenholm amendment would allow the Labor Department to implement new regulations to expand the practice of hiring helpers. These helpers will receive no formal training and, in time, will become a permanent underclass of workers at very low wages. In addition, a radical change in the spirit of Davis-Bacon—such as the Stenholm amendment—should not be decided by Labor Department regulation.

Mr. Chairman, we recently witnessed another example of the plan to create an underclass of workers when we witnessed the forced agreement on a subminimum wage in the compromise version of the fair labor standards amendments in the last Congress. But this Member of Congress will not idly stand by and allow yet another attempt to gut this Nation's cherished labor protection laws go unchallenged.

The apprenticeship program we must protect today has a long and proud history of training men and women to become skilled journeymen in the construction industry. Allowing the expanded use of helpers on Federal projects would only upset the working relationship between journeymen and apprentices and drive down the wages of all workers at these construction sites.

I urge my colleagues to join me in opposing the Stenholm amendment and supporting a better standard of living for all workers on Federal or federally funded construction projects.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Texas [Mr. STENHOLM].

The question was taken; and the Chairman announced that the noes appear to have it.

RECORDED VOTE

Mr. STENHOLM. Mr. Chairman, I demand a recorded vote.

A recorded vote was ordered.

The vote was taken by electronic device, and there were—ayes 173, noes 244, not voting 16, as follows:

[Roll No. 34]

AYES—173

Allard	Beilenson
Andrews (TX)	Bentley
Anthony	Bereuter
Archer	Bilirakis
Armey	Bliley
Baker	Boehner
Ballenger	Broomfield
Barnard	Bunning
Barrett	Byron
Bartlett	Callahan
Barton	Camp
Bateman	Campbell (CA)

Chandler
Chapman
Clinger
Coble
Coleman (MO)
Combest
Cooper
Cox (CA)
Cunningham
Dannemeyer
Darden
de la Garza
DeLay
Derrick
Dickinson
Doolittle
Dornan (CA)
Drefer
Duncan
Edwards (OK)
Emerson
Fawell
Fields
Franks (CT)
Gallegly
Gekas
Geren
Gilchrest
Gillmor
Gingrich
Goodling
Goss
Gradison
Grandy
Gunderson
Hall (TX)
Hammerschmidt
Hancock
Hansen
Hastert
Hatcher
Hayes (LA)
Hefley
Hefner
Henry
Herger
Hobson
Holloway
Hopkins
Huckaby
Hunter
Hutto
Hyde
Inhofe
James
Jenkins
Johnson (CT)
Jones (NC)
Kasich
Klug
Kolbe
Kyl
Lagomarsino
Lancaster
Leach
Lewis (CA)
Lewis (FL)
Lightfoot
Livingston
Lowery (CA)
Madigan
Marlenee
Martin
McCandless
McCollum
McCrery

McCurdy
McEwen
McMillan (NC)
Meyers
Miller (WA)
Molinari
Montgomery
Moorhead
Morella
Myers
Neal (NC)
Nichols
Nussie
Oxley
Packard
Parker
Patterson
Paxon
Payne (VA)
Petri
Pickle
Porter
Price
Pursell
Quillen
Ramstad
Ravenel
Ray
Rhodes
Riggs
Ritter
Roberts
Rogers
Rohrabacher
Ros-Lehtinen
Rose
Roth
Rowland
Schaefer
Schiff
Schulze
Sensenbrenner
Shaw
Shuster
Skeen
Slaughter (VA)
Smith (OR)
Smith (TX)
Snowe
Spence
Stearns
Stenholm
Stump
Sundquist
Tanner
Tauzin
Taylor (MS)
Taylor (NC)
Thomas (CA)
Thomas (GA)
Thomas (WY)
Upton
Valentine
Vander Jagt
Vucanovich
Walker
Weber
Whitten
Wolf
Wylie
Young (FL)
Zeliff
Zimmer

NOES—244

Abercrombie
Ackerman
Alexander
Anderson
Andrews (ME)
Andrews (NJ)
Annunzio
Applegate
Aspin
Atkins
AuCoin
Bacchus
Bennett
Berman
Bevill
Bilbray
Boehlert
Bonior
Borski
Boucher
Boxer
Brewster
Brooks
Browder
Brown
Bruce
Bryant
Burton
Bustamante
Campbell (CO)
Cardin
Carper
Carr
Clay
Clement
Coleman (TX)
Collins (IL)
Collins (MI)
Condit
Conyers
Costello
Coughlin
Cox (IL)
Coyne
Cramer
Davis
DeFazio
DeLauro
Dellums
Dicks
Dingell
Dixon
Dooley
Dorgan (ND)
Downey
Durbin
Dwyer
Dymally
Early
Eckart
Edwards (CA)
Edwards (TX)
Engel
English
Erdreich
Espy
Evans
Fascell
Fazio
Feighan
Fish
Flake
Foglietta
Ford (MI)

Frank (MA)
Frost
Gallo
Gaydos
Gejdenson
Gephardt
Gibbons
Gilman
Glickman
Gonzalez
Gordon
Gray
Green
Guarini
Hall (OH)
Hamilton
Harris
Hayes (IL)
Hertel
Hoagland
Hochbrueckner
Horn
Horton
Houghton
Hoyer
Hubbard
Hughes
Jacobs
Jefferson
Johnson (SD)
Johnston
Jones (GA)
Jontz
Kanjorski
Kaptur
Kennedy
Kennelly
Kildee
Kleczka
Kolter
Kopetski
Kostmayer
LaFalce
Lantos
LaRocco
Laughlin
Lehman (CA)
Lehman (FL)
Lent
Levin (MI)
Lewis (GA)
Lipinski
Lloyd
Long
Lowey (NY)
Luken
Machtley
Manton
Markey
Martinez
Matsui
Mavroules
Mazzoli
McCloskey
McDermott
McGrath
McHugh
McMillen (MD)
McNulty
Mfume
Miller (CA)
Mineta
Mink
Moakley
Mollohan
Moody

Moran
Morrison
Murtha
Nagle
Natcher
Neal (MA)
Nowak
Oakar
Oberstar
Obey
Olin
Orton
Owens (NY)
Owens (UT)
Pallone
Panetta
Payne (NJ)
Pease
Pelosi
Penny
Perkins
Peterson (FL)
Peterson (MN)
Pickett
Poshard
Rahall
Rangel
Reed
Regula
Richardson
Ridge
Rinaldo
Roe
Roemer
Rostenkowski
Roukema
Russo
Sabo
Sanders
Santorum
Sarpalius
Savage
Sawyer
Saxton
Scheuer
Schroeder
Schumer
Serrano
Sharp
Shays
Sikorski
Sisisky
Skaggs
Skelton
Slattery
Slaughter (NY)
Smith (FL)
Smith (IA)
Smith (NJ)
Solarz
Spratt
Staggers
Stallings
Stark
Stokes
Studds
Swett
Swift
Synar
Tallon
Thornton
Torres
Torricelli
Towns
Traficant
Traxler

Unsoeld
Vento
Visclosky
Volkmer
Walsh
Washington
Waters
Waxman
Weiss
Weldon
Wheat
Williams
Wise
Wolpe
Wyden
Yates
Yatron
Young (AK)

NOT VOTING—16

Crane
Donnelly
Ford (TN)
Ireland
Levine (CA)
McDade
Michel
Miller (OH)
Mrazek
Murphy
Ortiz
Roybal
Sangmeister
Solomon
Udall
Wilson

APPENDIX M

CONGRESSIONAL RECORD—SENATE

S 3544

March 19, 1991

The PRESIDING OFFICER. Objection is heard. The Senator from Oklahoma is recognized.

AMENDMENT NO. 51

(Purpose: To strike the general provision which prohibits the increase use of helpers on Federal construction projects and barring implementation of revised apprenticeship regulations)

Mr. NICKLES. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Oklahoma [Mr. Nickles], for himself Mr. HELMS, and Mr. SYMMS, proposes an amendment numbered 51.

Mr. NICKLES. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

Beginning on page 43, line 3 strike all through line 15.

Mr. ADAMS. Parliamentary inquiry, Mr. President. What is the time agreement on this amendment? I think that was agreed to. I know there were a lot of discussions. Is it 20 minutes with part of it for tomorrow morning? Would you repeat that for us, please?

The PRESIDING OFFICER. There is a 40-minute allocation of time equally divided tonight between the Senator from Oklahoma and the Senator from Iowa [Mr. HARKIN].

Mr. ADAMS. It was my understanding that a portion of that was allocated over until tomorrow morning. 15 minutes. Is the Senator correct?

Mr. ADAMS. To 9 or 9:15.

The PRESIDING OFFICER. The Chair indicates that there are 15 additional minutes equally divided tomorrow morning before the vote, in addition to the 40 minutes this evening equally divided as the Chair so stated.

Mr. ADAMS. I thank the Chair.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. NICKLES. Mr. President, the amendment I have sent to the desk on behalf of myself and others would strike language that is in the bill on page 43, line 3 through line 15. This is a subject that a lot of us have debated in the past. I have tried to exempt tenants from the Davis-Bacon law so they can work in their homes. I will probably try that again on housing reauthorization. I have tried to come up with a small business exemption for Davis-Bacon so we can have small business participate in Government contracts. That is not what the Senator is trying to do this time. Senator NICKLES is not trying to insert language to repeal Davis-Bacon. This is my effort now to try to repeal language that was inserted in the House that would stop the Department of Labor from implementing regulations dealing with Davis-Bacon. Frankly, these regulations have been in the process now for over 10 years. The Department of Labor has now issued those regulations, and some Members of the House did not like them.

And so in this appropriations bill of 56 pages there is one little paragraph on page 43 that says the Department of Labor cannot spend a dime to implement these regulations. In other words, they want to kill these regulations. Well, what is so evil about these regulations that the Department of Labor has worked so very hard to implement?

These regulations deal with semi skilled workers, or helpers. They allow the Department of Labor to implement a helper classification, which is a common thing done in construction now. Why would anyone want to prohibit the Department of Labor from implementing these regulations? Frankly, some leaders in organized labor, do not want these regulations to go forward because they fear it might introduce more people into the work force to compete with them.

I find that to be ridiculous. These regulations, to make it very simple, would allow a construction project to employ helpers, if they normally employ helpers, in the private sector. They allow it. They do not mandate it. They allow a construction company, if the prevailing practice is to use helpers, to use helpers in their construction projects with the Federal Government. I think it makes sense.

In other words, when you are talking about semiskilled laborers that maybe would be making $7 an hour, why should they be paid the journeyman's rate of $20 or $25 an hour? This will only inflate the cost of the project. It also denies somebody that job, it denies somebody trying to enter into the work force the opportunity to learn a trade, the opportunity to get off the streets, the opportunity maybe to get off crime and start earning an honest living. I find that to be probably the most objectionable part about this attempt to stop these regulations, the language on page 43 would stop a lot of people from entering the work force.

Mr. President, I feel very strongly about this amendment of mine to delete the language that should not be in this appropriations bill. This appropriations bill goes under the title of emergency supplemental. Yet, we have some people in the House, and I am afraid now in the Senate, who want to legislate labor law, who want to prohibit the Department of Labor from implementing regulations it has been working on for 10 years. Now that those regulations are to be in effect, they say no, to the

Department of Labor. They prohibit the Department of Labor from expending funds to administer the regulations.

I happen to think these regulations make sense, common sense, that if a private contractor does business with the private sector and he employs semiskilled laborers, he should be able to do the same thing when he works for the Federal Government.

These are regulations that my colleagues who oppose this amendment do not want.

What will be the result? It will be wasting taxpayers' dollars and it will be denying people the chance to climb the economic ladder. This is really pulling the economic ladder out of the water and saying we do not want you on board. You do not have the classification. There is no classification for semiskilled or for helpers. Therefore, if you are not a journeyman, you do not have the opportunity to participate on Federal construction projects.

What it also means is that we are going to be paying journeymen journeyman wages to do helper work. We are going to be paying carpenters $26 an hour to be sweeping up. We are going to be paying $22 an hour to a plumber to clean the floors.

I do not think that makes sense. I am not knocking anybody who is in the janitor service. I used to have such a job myself. I worked my way through school sweeping floors, so I do not look down on any particular job classification. I look at job classification as a way to climb the economic ladder. If we do not strike this prohibition on implementing these regulations, we are going to be denying a lot of people entry-level jobs all across the country.

Mr. President, we are also going to be wasting taxpayers dollars. A lot of people say, wait 1 minute, where is the waste, fraud, and abuse? I will tell you one of them is in Davis-Bacon. These regulations would take away some of the waste, fraud, and abuse in Federal spending.

So this is not a Don Nickles amendment to kill Davis-Bacon, or eliminate Davis-Bacon, or even have a small business exemption from Davis-Bacon. This is an amendment that would strike language which prohibits the Department of Labor from even implementing language to allow helpers all across the country where it is already a prevailing practice.

Mr. President, if we do not strike this language we are going to be wasting billions of dollars.

People ask, well, why does Federal spending continue to climb? Why cannot Congress get a handle on it? It is because of little paragraphs stuck in appropriations bills like this that cost billions of dollars.

They say, well, where do you get these figures? I will show you the figures. This is an estimate that came from OMB on March 18. OMB estimates that these regulations which the bill language seeks to strike would save $2,717,000,000 in the next 5 years.

You say, well, that is OMB. What about CBO? They work for Congress. CBO estimates that it would save $2,142,000,000 over the next 5 years. CBO and OMB say that the helper regulations will save money. But yet the language that was inserted in the supplemental appropriations bill says no, no money shall be spent to implement the regulations. Therefore, go ahead and waste the money.

If we do not pass my amendment, that is exactly what we are going to do. We are going to waste $2 billion in the next 5 years for no reason whatsoever. And not only will we waste $2 billion, we will be denying thousands of people entry level jobs. They can get entry level jobs when they work in the private sector for private contractors, but if that contractor does business with the Federal Government he is not entitled to helper classification or a semiskilled classification.

How many employers are going to hire somebody that is semiskilled if they have to pay journeyman wages? No one. They are not going to do it, not for $22 an hour.

So you are going to have a lot of minorities, poor peple, and people who want to join the economic mainstream denied jobs if we do not remove this language. These people want to have a job, even if that job pays $7 an hour. They want to have that opportunity.

That is the purpose of my amendment. This amendment is supported by the administration. I will just read one paragraph of a letter from the Secretary of Labor dated March 19, 1991. It says, "The administration strongly opposes section 303 and its purposes. We also strongly oppose legislating substantive labor policy in an appropriations bill. An appropriations bill is not the appropriate vehicle for introducing significant reversals in established governmental policies. Additionally, implementation of section 303 will cost the Federal Government at least $623 million in additional construction labor costs during 1992. For these reasons, the administration supports the motion to strike the provision from H.R. 1281."

Mr. President, a lot of times we hear people on the floor, and we hear people making speeches at home, giving accolades to and complimenting free enterprise. If we allow this language in section 303 to strike the regulations as proposed by the administration dealing with Davis-Bacon, allowing a helper classification, we are certainly casting an antifree enterprise vote.

We are saying that we do not care what you do as an employer in the private sector, we are going to mandate that you pay wages for a journeyman classification for semiskilled work. That is not free enterprise.

Whatever happened to the idea of allowing an employer and an employee to decide what is mutually beneficial as far as wages and benefits? Why in the world would we have the Federal Government dictating that you cannot have a helper classification? That is exactly what will happen if we allow this language to stay in.

There is a provision in these regulations that prevents any abuse of the helper classification. The regulations say

you cannot have any more than 40 percent of your work force in a helper classification. No one is going to be able to hire only helpers or semiskilled workers to do skilled work.

These regulations are well thought out. They are not antilabor regulations. These regulations allow and promote free enterprise. They are regulations that promote the prevailing practices that are done right now in the private sector.

We should not be denying jobs for people on the lowest end of the economic scale.

So even if you do not care about saving $623 million next year, if you do not really care about wasting taxpayers' money; for crying out loud, support my effort to strike this one section because you want to give some people a chance. You want to allow some people who right now maybe do not have a job to get that first job, to learn that semiskilled job so they can learn a skilled job. Let us not deny them that opportunity.

Mr. President, I ask unanimous consent that a letter from Secretary of Labor Lynn Martin be printed in the RECORD. In addition I ask unanimous consent that a letter by the National Taxpayers Union, the U.S. Chamber of Commerce; the Chamber of Commerce from Tulsa, OK, the Coalition to reform the Davis-Bacon Act be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

DEPARTMENT OF LABOR,
Washington, D.C., March 19, 1991.

Hon. ROBERT DOLE.
U.S. Senate, Washington, DC

DEAR MR. LEADER: It is my understanding that an amendment to strike Section 303 of H.R. 1281, the "Dire Emergency Supplemental", will likely be offered by Senator Don Nickles during Senate consideration of that

measure. The Administration supports the Nickles amendment.

This letter is to express the Administration's strong objection to Section 303 of H.R. 1231, which was approved by the House of Representatives on March 7 and the Senate Appropriations Committee on March 14. Section 303 would prohibit the Department of Labor from expending funds to administer regulations governing the use of semi-skilled helpers on federally-financed and assisted construction contracts subject to the Davis-Bacon and Related Acts (DBRA). These regulations went into effect on February 4, 1991. It would also enjoin the Department from promulgating final regulations pertaining to revisions to the apprenticeship programs in the construction industry.

The Administration strongly opposes Section 303 and its purposes. We also strongly oppose legislating substantive labor policy in an appropriations bill. An appropriations bill is not the appropriate vehicle for introducing significant reversals in established governmental policies. Additionally, implementation of Section 303 will cost the Federal Government at least $623 million in additional construction labor costs during FY 1992. For these reasons, the Administration supports a motion to strike the provision from H.R. 1281.

The issues underlying the DBRA regulations have been examined extensively over the past decade, and the Department's authority to implement them has been sustained through the courts. The objections to these regulations were considered in the courts and were rejected. The helper regulations reflect a longstanding position of the Executive Branch over the last decade.

These regulations set no government-imposed constraints or conditions on construction contractors or construction workers. The employment of helpers is permitted only when their use is the prevailing practice in

an area. The regulations do place limits on the ratio of helpers to journeymen to prevent abuses—their use is limited to two for every three journeymen.

Permitting the use of helpers, according to local industry practices, will: Save the Federal government a substantial amount in construction labor costs (estimated to be at least $623 million in FY 1992); provide increased job opportunities for semi-skilled workers and encourage their use in a manner which provides training; update outmoded practices under Davis-Bacon to reflect more accurately widespread industry practices thereby enhancing private sector competition on Federal construction projects.

The proposed revisions to the regulations governing the Department's registration of traditional apprenticeship programs were published after two years of research, review, and discussion in an open and public debate on the issues. The purpose was to streamline and update these regulations as part of an overall Departmental program to expand apprenticeship to additional occupations and industries and to maintain and improve the quality of all apprenticeship programs. These regulations would require State Apprenticeship Councils to promptly advise a sponsor of a proposed apprenticeship program of a decision on the sponsor's request and furnish an explanation of the decision in the event of a denial. In addition, there would be the right of appeal to the Department of Labor if the request was denied.

The changes proposed in the revised regulations are intended to reduce subjectivity and the opportunity for bias in determining conditions for program registration and in the monitoring of programs.

When put in place, these revised regulations will: Ensure that all registered programs meet consistent, high quality standards; ensure that all potential program sponsors are treated fairly by setting up a Departmental

appeal process; establish a uniform Federal standard for registering apprenticeship programs, with allowances for State flexibility for specific State purposes.

In addition, I would point out that these regulations are still in proposed form. We will keep the Congress informed as the rule-making proceeds.

Again, and for the foregoing reasons, the Administration strongly opposes Section 303 of H.R. 1281. Background information on the helper regulations is enclosed.

The Office of Management and Budget advises that there is no objection to the transmittal of this letter from the standpoint of the President's program.

Sincerely,

LYNN MARTIN,
Secretary of Labor.

NATIONAL TAXPAYERS UNION,
Washington, DC, March 19, 1991.

HON. DON NICKLES.
U.S. Senate, Washington, D.C.

DEAR SENATOR NICKLES: The National Taxpayer Union strongly supports your amendment to H.R. 1281, the Dire Emergency Supplemental Appropriations bill which will strike language approved by the House of Representatives preventing the Department of Labor from implementing its "helper" regulations. The regulations cover the use of semi-skilled labor, known as "helpers", on Federally-financed and assisted construction projects.

The Labor Department's proposed regulations are the result of lengthy and thorough consideration. They reflect a long-standing effort, lasting more than nine years, to update antiquated regulations which have little relation to the modern workplace. The regulations are mod-

est and their scope is limited. Importantly, the proposed regulations would only apply to areas where the use of "helpers" is the prevailing practice in non-Federal construction.

From the standpoint of the taxpayer, the regulations are potentially very important. As you have pointed out, estimates of cost savings range from $500-600 million per year. The Congressional Budget Office has estimated that the savings could be as much as $2 billion over the next five years. In light of this year's record Federal deficit, Congress should seek every opportunity to encourage an efficient government.

On behalf of our 200,000 members, we strongly endorse your efforts to strike the House language and we urge an adoption by the full Senate.

Sincerely,

JAMES D. DAVIDSON,
Chairman.

U.S. CHAMBER OF COMMERCE,
Washington, DC, March 19, 1991.

MEMBERS OF THE U.S. SENATE: When the Senate takes up H.R. 1281, the Supplemental Domestic Appropriations bill, a fight is likely to be waged over the Davis-Bacon Act of 1931. A legislative rider was inserted into this appropriations bill by the House, almost unnoticed, that would prohibit the Secretary of Labor from implementing the final regulations under Davis-Bacon that would allow the employment of semi-skilled helpers on federally financed construction projects. The regulations went into effect on February 4. An amendment to strike the rider will be offered. The U.S. Chamber of Commerce strongly urges you to support this amendment.

After nine years of litigation and redrafting, the federal courts have determined that these helper regulations are fully consistent with the long-stated intent of the Davis-Bacon Act that federal construction contracts reflect locally prevailing wages. In the 1930s, the use of helpers was virtually nonexistent in the construction industry. Today, the practice is almost universal, except in federal contracts, which have remained covered by archaic, obsolete "work rules.

For example. under longstanding Davis-Bacon rules, a contractor is required to classify and pay the same semiskilled helper as a journeyman carpenter for moving lumber one day, and as a journeyman plumber for carrying pipes and tools the next. As a result of such complications and the attendant paperwork, small and minority contractors simply walk away from federal contractors. In contrast, the new, final regulations would recognize a "helper" classification in locations where employing helpers is a locally prevailing practice. The final regulations also would provide stringent safeguards to prevent the inappropriate substitution of unskilled helpers for skilled mechanics.

The Office of Management and Budget, using a methodology agreeable to the Congressional Budget Office, estimates the helper regulations will save approximately $500 million in budget authority and $200 billion in outlays in fiscal year 1992. After they are fully phased in, the regulations will save about $600 million a year. By more accurately reflecting local labor markets, the regulations will open up competition for federal contracts to small and minority firms, and create more job opportunities for minorities, women, and entry-level workers.

The Secretary of Labor's helper regulations are one significant step toward improving the administration of a permanently problematic law. The extraneous rider banning helpers is the wrong provision in the wrong bill under the wrong procedure, and should be deleted. To

that end we ask your support for the amendment allowing these beneficial regulations to go forward.

Sincerely,

DONALD J. KROES.

TULSA CHAMBER OF COMMERCE,
Tulsa, OK, March 18, 1991.

Hon. DON NICKLES,
U.S. Senate, Washington, DC.

DEAR DON: On March 7, the House considered H.R. 1281, the Emergency Supplemental Domestic Appropriations bill, and added a nongermane rider repealing regulations which allow semi-skilled "helpers" to perform certain tasks on federal construction projects. These regulations, issued by the Secretary of Labor, have been determined by federal courts to be fully consistent with the intent of the Davis-Bacon Act that federal contracts reflect locally prevailing wages. In addition, these helper regulations would have $500-600 million per year and open up competition for federal contracts to small and minority firms, thereby creating more jobs for minorities, women and entry-level workers.

This appropriations measure will probably be taken up by the Senate tomorrow, Tuesday, March 19 and with it, an amendment to protect these helper regulations by striking the House-approved rider.

Your assistance in supporting this amendment to protect the Davis-Bacon regulations is critical. Thank you for your consideration.

Kindest personal regards,

CLYDE C. COLE,
President.

COALITION TO REFORM
THE DAVIS-BACON ACT.
Washington, DC, March 15, 1991.

The members of the Coalition to Reform Davis-Bacon urge you to support a motion to be offered by Senator Nickles on the Senate floor during consideration of the Dire Emergency Supplemental Appropriations bill (H.R. 1281). The motion will strike language in the bill prohibiting the Department of Labor from implementing it's final regulation on "helpers" on Davis-Bacon jobs, and improving the regulations which govern the approval of apprenticeship and training programs.

The helper regulations reflect widespread industry practice and a nine year effort on the part of the Department of Labor spanning two administrations, to update 1930's-style work rules. Helpers are semi-skilled workers who assist journeylevel workers on construction projects.

The Coalition has consistently pushed for the implementation of helpers on Davis-Bacon projects which will:

Provide increased job opportunities for semi-skilled workers, including many minority workers, giving them an entry into the construction industry;

Bring Davis-Bacon projects more in line with locally prevailing practices thus making it more attractive for small and minority contractors to compete for this work;

Save the Federal government an estimated $500-$600 million in construction labor costs per year.

Under the regulations that have been approved by the U.S. District Court Judge, Harold Greene, helpers can only be used when they are prevailing in the local area and then only a ratio of two helpers to every three journeyworkers. In its recent decision, the district court stated that the regulations are fully consistent with the language and purpose of the Davis-Bacon Act to protect locally prevailing practices, and that the promulgation of

the regulations was well within the authority delegated to the Secretary under the Davis-Bacon Act.

The Coalition unequivocally opposes this naked act of desperation on the part of those who opposed helpers throughout the regulatory process and the nine year legal battle that followed. This provision blatantly violates the longstanding prohibition on legislating policy through appropriations measures. Any bill which does not have hearings or a record to support it is clearly an inappropriate vehicle for reversing carefully developed and well established administration policies.

Please support the Department of Labor in closing the gap between federal and private sector construction and support the motion to strike this provision from the appropriations bill.

Sincerely,

The Coalition to Reform the Davis-Bacon Act:

Air Conditioning Contractors of America.
American Farm Bureau.
American Public Transit Association.
American Road and Transportation Builders Association.
Associated Builders and Contractors.
Associated General Contractors of America.
Brick Institute.
Brown & Root, Inc.
Citizens Against Government Waste.
Contract Services Association.
Independent Electrical Contractors, Inc.
Labor Policy Association.
National Aggregates Association.
National Association of Counties.
National Association of Homebuilders.
National Association of Housing and Redevelopment Officials.

National Apartment Association.
National Association of Manufacturers.
National Association of Minority Contractors.
National Center for Neighborhood Enterprise.
National Federation of Independent Business.
National League of Cities.
National Ready Mixed Concrete Association.
National School Boards Association.
National Stone Association.
National Tax Limitation Committee.
National Taxpayers Union.
National Utility Contractors Association.
Printing Industries of America.
Public Service Research Council.
U.S. Chamber of Commerce.

Mr. NICKLES. To summarize, Mr. President, the coalition to reform Davis-Bacon, which basically says we think the regulations make sense, they are fair to workers, they are the prevailing practice in the private sector, we can save billions of dollars if we allow them to be implemented—support my amendment. My amendment is supported by, numerous organizations including the American Farm Bureau, the Citizens Against Government Waste, the Labor Policy Association, the National Association of Home Builders, the National Apartment Association, the National Association of Manufacturers, the National Association of Minority Contractors, the National Center for Neighborhood Enterprise, the National Federation of Independent Business, the National School Boards Association, National Taxpayers Union, as well as the Chamber of Commerce, and many others that are members of the coalition to reform Davis-Bacon.

As my colleagues can tell, there is broad coalition support for making common sense out of an archaic law to allow the prevailing practice and to allow people the opportunity to work. If they can work in the private sector, they should be entitled and allowed to work for people

who are doing work for the Federal Government. Let us not deny them that opportunity.

This amendment is a small business amendment. This is a free enterprise amendment. This is an economic opportunity amendment for those people who are disadvantaged who have not yet entered the work force. Mr. President, I urge my colleagues to support the amendment.

Mr. COCHRAN. Mr. President, section 304, as it applies to the Department of Labor's helper rules for Davis-Bacon construction contracts, should never have been included in this legislation by the other body.

As I understand this issue, the Department of Labor has worked in a responsible fashion with all parties concerned to craft reasonable, common-sense rules that will allow for the use of helpers under Davis-Bacon contracts in areas where the use of helpers is a prevailing practice in the construction industry.

The final rules are not the result of some arbitrary action by Department of Labor officials. They are the product of over 10 years of careful examination and consideration of the issue of using helpers to save costs under Davis-Bacon contracts.

If the provisions of section 304 are allowed to take effect to prohibit the implementation of these rules, the Department of Labor estimates that it will cost the Federal Government an additional $623 million in fiscal year 1992.

I find it very difficult to comprehend that the Congress is prepared to add a half-billion dollars to the Federal Government's construction expenses for next year just to prevent the limited use of helpers under Davis-Bacon contracts.

Those who may not be familiar with the issue may not be aware that the Department's rules do not give a blank check for contractors to replace journeymen workers with helpers.

The rules require that no more than two helpers may be employed for every three journeymen, and, further-

more, that the practice of employing helpers will only be allowed when their use is the prevailing practice in the area. These rules are reasonable; recognizing and attempting to deal with the problem of providing employment opportunities for entry level workers in the construction industry.

Mr. President, the final rules have been promulgated after many years of negotiation and litigation. The courts have agreed that they are fair to all the concerned. When these facts are considered in conjunction with the more than $600 million in fiscal year 1992 savings and the several billion dollars in additional savings to the taxpayers over the next several years. I don't see how this body in good conscience can oppose this effort to strike section 304.

Mr. HARKIN. Mr. President, I understand the Senator from Iowa holds 20 minutes time.

The PRESIDING OFFICER. (Mr. GRAHAM). The Senator is correct.

Mr. HARKIN. Mr. President, yield myself such time as I may consume, and then I will yield the remainder of the time to the Senator from Washington.

Mr. President, I rise in opposition to the amendment offered by my friend from Oklahoma. I guess this amendment can be best described as a cold leftover crumb from the banquet of greed of the Reagan administration, a banquet of greed that said to the working people of this country that you can keep getting less and less but those at the top can keep getting more and more.

Real wages we know have fallen over the last 10 years of our working people in this country. That is what this amendment is trying to do, to again tell the working people of this country that they should accept even less than they are getting now. For 10 years the Reagan administration, now the Bush administration, have been trying to change what has been settled, practiced in law since 1937. For 10 years the Congress has said no. So now what they are trying to do is by fiat and regulation

what they could not accomplish by changing the law because the Congress said "no."

Since 1937 we have had apprenticeship programs in this country. Over 30 States now have apprentice councils and apprenticeship programs. All of the building trades industry have apprentice programs. It is a way for a young unskilled worker to enter the work force as an apprentice to do maybe some of the menial jobs, to help cut, but to learn how to do that journeyman's job. whether it is a bricklayer, laborer, carpenter, pipefitter, cement finisher, whatever it might be in the construction industry. It is a way for young people to get in there, be an apprentice, and go on to be a journeyman.

This amendment, and what the regulations that are trying to be foisted on us by the Bush administration would do is say, no, we are not going to have that apprenticeship program any more, we are going to have a whole subculture of helpers with subminimum wages, low wages with no hope of ever getting out of it; no hope of ever getting and climbing up that ladder of apprenticeship, being a journeyman.

The distinguished Senator from Oklahoma says if you do not care about wasting money, then you can go ahead and vote against this amendment, I guess. We do not care about wasting money.

You know what wastes money? Shoddy construction, projects that do not last very long. That is what you get when you have unskilled construction people building our buildings.

You can go out and look for yourself. Find a building that is built with good union labor. You will find good construction that is going to last for a long time. Find one that is not, and you will find one that will fall down in a shorter period of time. We are talking about here Federal projects. We are not talking about private. We are talking about projects that come under Davis-Bacon This is Federal projects.

I am telling you if my taxpayers, and myself as a taxpayer, if I am going to be paying money to build something under the auspices of the Federal Government, I want it to be built well. I want it to last a long time. I do not want it falling down. I want it to be built with journeymen labor and skilled labor.

You want to waste money? I tell you if you want to waste money, you support the amendment of the Senator from Oklahoma. You will get some cheap building out there. You will get a cheap building that will fall down and will not last very long. Again, maybe in the short term it might be all right, but that is another legacy of the Reagan administration. Just look at the short term. Forget about the long-term. That is what this is—a short-term view.

Mr. President, we have tried for a long time. We should not let them do by fiat what we would not let them do by law. I have every reason to believe that again Congress will say, no, that we are not going to let them take away the apprenticeship programs that have been so vital to our country.

I will close by saying I think one of the things wrong in this country today—we have all of these economic theories about what is wrong, what is going on in America—I have always reduced it to very simple terms. Mr. President, I think what is wrong in this country today is that there are too many people making money on money, and there is not enough people making money building, constructing, mining, manufacturing, raising, growing, the things that produce real wealth in this country.

People that are working out there—building our highways and bridges, skyscrapers, and schools—ought to be paid well, a decent living wage, whereby they can raise their families, feed them, clothe them, and educate them, have a home of their own, a car, educate their kids, have retirement and health care for the people that build

America. These are the people that build this country, and we can accept no less than that.

Mr. President, I yield the remainder of my time, or whatever time he may consume, to my distinguished friend from Washington.

Mr. ADAMS. I thank my friend, the Senator from Iowa, for his excellent statement.

I rise today in strong opposition to the Nickles amendment. I want to echo what has been said by my friend, the Senator from Iowa. Senator HARKIN. What we are talking about in this amendment is to strike Davis-Bacon and to drive down the wages and working conditions of skilled working people in the United States—the people in the United States who work with their hands and work with their tools and build things.

We spent too much time, in recent years, paying attention to people who have made money on money and too little time to the people who really work to make this country competitive and a better country. Competition does not come from making money on money. Competition comes from skilled people being able to do a skilled job, and do it well and in a quality manner, who have been well-trained, and who like their jobs, and who are well paid for it, and who can buy their home and raise their families and raise their children.

What this amendment attempts to do is put in place regulations issued by the Department of Labor of this administration that would say; We are going to put on jobs unskilled people. Yes, it is always a little cheaper in the shortrun, to take quality people off the job, or to say to a quality journeyman, such as a carpenter, somebody working in a skilled trade on a job in construction, and say he has to work as a helper. That is what this is.

Let us turn this coin around. This is not just to bring people in at the bottom. This is a two-pronged attack that we are trying to prevent. And that two-pronged attack is, first, to change the definition of people working on a job, which they cannot do by legislation, but do it by reg-

ulation so that people are paid helper's wages rather than journeyman's wages. All those groups you heard listed by the Senator from Oklahoma—I hope everybody listened, because those are the people who are doing the hiring—they are not the people who are doing the work.

The second part of this two-pronged attack is to destroy the apprenticeship programs of the States, and the apprenticeship program—and I had the honor and the privilege to attend one recently in Seattle—where skills are given to those who are coming into the work force, the true helpers, so they become journeymen, so they have a skill so they can take their tools from job to job and not be forced into a permanent classification where they can do no more than unskilled work. This amendment would go directly toward taking away the programs that teach the skills to people that are out working in our technical force.

I am talking about the people that build the highways and the buildings in this country, the people that build the houses in this country, I am not talking about technical experts that are dealing with maybe a computer, or in a financial institution, or working for an insurance company. Those are all fine jobs, and I think it is wonderful for people that are in them, and they are well paid for them.

What this is an attempt to do is to take the other technical skills of this country, which are skills that we need to build our automobiles, and to build our houses, and to build our appliances, and to say to them, we will not have apprentice programs; we will just freeze things the way they are. Does it save you some money short term? What this really gets down to is breaking unions or breaking the ability of people to train other people to do jobs. You can get a short-term saving on it by putting on a number of helpers, but the thing that happens is the quality of your work goes down, and the quality of your job goes down.

The administration has come to the Hill again and again to try to pass this legislatively, and we will give them a hearing and a vote, and they have had them, and they have lost them. Now they are doing by regulation what they cannot do by legislation. All this provision is is a simple statement that the Congress has the power to legislate, and the administration cannot do by regulation what it has to do by legislation.

So let them bring the bill up. We will have the chance to vote on it. They will have plenty of chances to have us vote on it. And the House passed this bill by an overwhelming margin. Why? I want to protect the apprentice programs that now exist in my State and in other States that train people. Many people do not even know what these are.

But let me just take a moment so that my colleagues know that, for example, the Washington State Department of Labor and Industries has a one apprenticeship program.

I will ask unanimous consent that at the end of my statement the statement of the Department of Labor and Industries Director Joe Dear be made part of the RECORD. He was one of more than 60,000 citizens who commented in opposition to the United States Department of Labor's proposed changes in the apprenticeship rules.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. ADAMS. I want to compliment Chairman BYRD for maintaining this restriction in H.R. 1281.

The House voted 244 to 173, to show you how much people care about seeing that as young people enter the work force, they are not forced into permanent, low-paying jobs. There is a lot of difference between a job where you may be working just in a restaurant, where you will never get to be a chef, or never move up, and you will always get $5 or $7 an hour, or now to force it

into a construction industry, always $5 to $7 an hour, never a health and welfare program, never a chance to improve your skills, never a chance to get a job where you are paid a little more, and to get a little more quality, and to make us a really competitive nation.

The chairman of the House Labor and Education Committee and the Senate Labor and Human Resources Committee will have hearings if they want to change the Davis-Bacon Act. But this is regulatory mischief that has been going on for 10 years down at the Department of Labor. This is one of the first things sent up by our new Secretary of Labor. I am sorry about that letter, because I expected more and different things, because much of the prosperity of recent years for certain groups in American society has been paid for on the backs of the American working people who carried this Nation for years and years from World War II on, who carried it by the fact that they could educate their children. They had enough money to pay for their medical bills. They had enough money to put down for a house. We now have created in this country a group of people who do not have enough money to make a down payment on a house. They do not have enough money to buy medical insurance. There are 37 million people in the United States today who do not have medical insurance because they cannot afford it.

I get very tired hearing chambers of commerce and management groups say all we have to do is reduce the wages a little further and we will have some more money and then it comes around and we wonder why it is people are not able to buy houses; we wonder why the Federal Government is being asked to create a health insurance program.

We have tried to go to the marketplace to create a health insurance program, but you cannot do it on $5 an hour.

Why are we so selfish to our workers? Why are we so selfish to the people who are out there every day, every day, rain or shine, working on these jobs?

Why is Davis-Bacon with Federal jobs important? Because it sets a prevailing wage in an area. It gives an idea of what is a proper wage level for people to be paid.

Why drive down the wages of these people? This is not the place you are going to make savings, because we are going to pay them back elsewhere. We are going to pay them back in additional insurance costs the Government is going to have to pick up. We are going to have to pay it back because savings and loans are out doing high fliers because they cannot do enough in the housing market anymore.

Yet, we need to retrain our workers; we need to have our workers have more skills. How are they going to get them if we destroy the apprentice program, which is what will happen if the helpers are moved out to the job and out of the apprentice program. They will be gone and never get beyond that point.

I think we ought to unshackle a few rogue elephants loose in the Department of Labor who have been trying to rewrite this law and regulations for over 10 years.

The Senator from Oklahoma is right. They have been at this for 10 years trying to get these regulations in that would change the law, and that is what regulations are for. As a former Secretary of Transportation, I know that regulations are intended to follow the law. They are not to create the law.

To those who claim they would save money, I would say this: One, we are spending billions to pay out the savings and loan cesspool. Working people are picking up the tab.

We are sending billions of dollars from the United States to countries from Afghanistan to Zaire and hundreds of points in between, and American workers are to be paying for those programs.

We forgive the debts of countries that join us in battle and we felt that was good. I could see a reason for supporting it. But who has to pay for that? The American workers pay for that.

But here today we have an opportunity to stand up and be counted for wage levels paid to American workers, and that is what this is all about. How much are the wage levels you are going to pay to your own people and how much are you going to allow your own people to be trained? That is what it is all about.

I oppose this amendment by the Senator from Oklahoma. I oppose it with every breath I have and with all of my being, because I feel we should be going the other way in this country. We should be saying to our people they can be paid a decent wage for the work they have, that they are not going to be trapped in the same job forever, and that they will be rewarded for their quality as it improves and that we put quality people out on the jobs, and not say to our quality people instead, well, 40 percent are helpers, and remember all these jobs come up on bid, and this man is bidding with 40 percent helpers so I am sorry for you journeymen, 60 percent are applying, we have to knock 20 percent of you off and you have to be helpers. That is how you drive down the journeymen wage.

These people are not trying to be difficult. When you talk about the amount of money they are making compared to the amount of money that is made in the financial markets, by the stock brokers, by the sellers of junk bonds, by the people who are working in the type of jobs where they are working, money on money, and compare it to the amount of money the people are being paid to create things in this country, you find there is great disparity.

Maybe that disparity is the way this Nation is going. But I do not think this Congress should encourage that. If that is the thing that is going to happen we should try to see to it that it is slowed down, not rushed ahead, because otherwise, Mr. President, we are going to be paying more unemployment compensation benefits, we are going to have more people at $5 and $7 jobs and lower. And we are going to have fewer people with the

skills that are needed to get up on their feet and be able to support themselves and pay taxes.

That is what it is all about.

This fight on Davis-Bacon has gone on ever since I can remember. I have been in the Congress and administration and the Senate a long time. I have heard the same arguments before and will probably hear them again. But I have never seen regulations coming out to change the law as it is written.

I hope, Mr. President we will defeat this amendment.

I ask my colleagues to defeat the amendment of Mr. NICKLES, the Senator from Oklahoma, and I yield the floor.

EXHIBIT I

DEPARTMENT OF LABOR
AND INDUSTRIES,
Olympia, WA, October 11, 1990.

Re. comments on proposed revisions to 29 CFR 29 as published in the Federal Register August 24, 1990.

Assistant Secretary of Labor,
Employment and Training Administration,
Department of Labor, Washington, DC.

Attention, Director, Bureau of Apprenticeship and Training.

I am submitting comments on behalf of the State of Washington regarding the proposed revisions to federal regulation of apprenticeship programs. Adopting the proposed revisions would substantially change the state role in apprenticeship and also would change the nature of apprenticeship itself.

My concerns with the proposed revisions can be grouped into five categories:

1. Preemption of state authority;

2. Inefficient use of government resources;

3. Erosion of apprentice protections;

4. Erosion of industry-wide standards; and

5. Increasing federal responsibility during a time of decreasing federal resources.

I also am submitting additional comments on a separate enclosed page.

Preemption of State Authority.—The proposal eliminates the state's authority to require standards not set forth in federal rules (proposed 29 CFR 29.4(c)). It also expands the federal authority to approve programs (proposed 29 CFR 29.15(d)). The proposed revisions allow federal registration of any program for sufficient reason or when in the national interest.

The federal statute should not be interpreted to prevent states from imposing additional requirements necessary to protect apprentices or to promote efficiency in the use of state resources. The rules should not be rewritten to allow federal officials to approve programs rejected by the state to prevent harm to apprentices or avoid needless duplication of state resources.

Let me provide a real-life example. Under the new rules, the Bureau of Apprenticeship and Training (BAT) could approve a sprinkler fitter program that has been submitted to the Washington State Apprenticeship and Training Council and not approved. At the present time, an existing program is capable of meeting the training needs of these employers requesting an additional program. The proposed program intended to offer related and supplemental instruction classroom training at Edmonds Community College, only twenty miles away from the related and supplemental classroom training currently provided at the Duwamish Campus of Seattle Community

College. Allowing both programs to function would result in needless duplication of programs and unnecessary expenditure of scarce state tax dollars. In this state, the community college system cannot afford such duplication when so many other educational and training needs are not being met.

Let me cite another possibility. If twenty individual companies in the same trade in the same county submitted proposed standards for a new apprenticeship program, should BAT and/or the state approve all twenty if their standards meet minimum federal guidelines? The ongoing state or federal monitoring would be much more difficult for twenty programs rather than one multi-employer program.

With numerous separate programs what would happen to an apprentice who was laid off for lack of work? A single employer program would not have a mechanism to refer the apprentice to another employer. This would diminish the likelihood of the apprentice completing his or her training. In contrast, a single multi-employer program could develop such a referral program.

The state's ability to require multi-employer programs where appropriate would encourage affirmative action. At the present time, only programs with five or more apprentices must have an affirmative action program with specific goals. Encouraging or requiring multi-employer programs would increase the likelihood of affirmative action requirements applying to programs.

The proposal also requires that requests to establish apprenticeship programs be acted upon within 30 days and provides for expedited appeals of state action (proposed 29 CFR 29.5(g)). By law, the Washington State Apprenticeship and Training Council currently meets only every three months to act on proposals for new or revised programs. Unless additional funding becomes available to allow more frequent deliberation by the state council,

these timelines would effectively replace state decision making by the labor and management representatives on the state Apprenticeship Council with program decisions made by federal officials.

Efficient Use of State Resources.—In addition to the concerns about inefficiency discussed above, other sections of the proposed rules may promote inefficient use of state resources or hinder valuable training opportunities which now take place. The proposed revision increases minimum requirements for classroom instruction from 144 hours to at least 1/12 of training time of the apprenticeship (proposed 29 CFR 29.3(d)). This means an additional 20 hours of instruction is required each year.

Although basing classroom instruction in an apprenticeship program on a percentage of on-the-job training may be sound policy, the proposed ratio would increase training costs borne by community colleges and other state educational institutions without regard to the actual need for increased classroom related and supplemental instruction. In addition, the proposal to increase the minimum terms of apprenticeship from one to two years also would increase training costs without regard of the need of program sponsors for longer related and supplemental instruction training (proposed 29 CFR 29.3(a)). More importantly, this revision would reduce the opportunities for expanding apprenticeship into new occupations and decrease the chances of linking apprenticeship with short-term training programs such as JTPA and JSP.

Erosion of Protection for Apprentices.—One of the unique advantages of apprenticeship as compared to other job training methods is the protection afforded an apprentice from discriminatory practices of an employer and the likelihood of employment at completion of the apprenticeship. The proposed revisions contemplate revising apprenticeship program registration (proposed 29 CFR 29.5(b)) and program portability between states (proposed 29 CFR 29.6).

The proposed revision on registration would allow an employer with multiple plants across the United States to register the apprenticeship program in any state in which the program operates. Although improved accommodation for apprentice mobility may be desirable, without additional safeguards the proposed revisions would reduce a state's ability to monitor the training and welfare of apprentice workers.

Erosion of Training to Industry-Wide Standards.—Another advantage of apprenticeship as a training method is that apprentices are trained both to industry-wide standards and to the specific requirements of the employer sponsor.

The proposed revisions require that the ratio of apprentices to journey workers relate to the sponsor's ability and capacity to train (proposed 29 CFR 29.4(b)(6)(iii)). Current law requires that a numeric ratio of apprentices to journey-level workers be stated in program standards. While the proposed language provides added flexibility for apprenticeship to respond to changing business and labor conditions, it is important to have consistent ratio throughout an occupation to ensure uniformity in training that results in achievement of industry-wide standards.

This revision also provides another example of how the proposed rule would erode apprentice protection. To ensure adequate training and supervision of apprentice workers, the ratio of apprentices to journey level workers should never exceed 1:1. In addition, the rules should specify that the number of apprentices in training correspond to the sponsor's ability to retain apprentices at completion of the program.

Conclusion.—In short, the proposed regulations appear to shift responsibility for apprenticeship decisions from state councils comprised of labor, management and public representatives to federal officials. Not only will this change weaken apprenticeship training as it has been

conducted over the past fifty years, it completely ignores state and federal financial considerations by adding responsibilities to both levels of government in a time of shrinking resources.

It is ironic that the Bureau of Apprenticeship and Training proposes to take additional responsibility for program approval and monitoring at a time when its August 1990 newsletter recognizes that current staffing levels are threatened. It cites as a BAT priority recruitment of additional women apprentices and concedes that to accomplish that goal "past emphasis and priority activities must be changed. In other words, do more with less."

I would recommend that BAT focus on the laudable goal of improving outreach to women and to minority groups, rather than adopting new measures that will increase its workload, diminish state authority and promote inefficiency in the delivery of training programs.

Sincerely,

JOSEPH A. DEAR,
Director.

Mr. NICKLES. Mr. President, will the Senator yield for a question?

The PRESIDING OFFICER. The time controlled by the Senator from Iowa which has been transferred to the Senator from Washington has expired.

Mr. NICKLES. Mr. President, I ask unanimous consent for 2 additional minutes for my friend and colleague from Washington to respond to a question.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. NICKLES. Mr. President, I just wonder if we have anybody in the Senator's office that has a salary or wage of less than say $40,000 or $50,000 a year.

Mr. ADAMS. Is there in my office?

Mr. NICKLES. Yes.

Mr. ADAMS. Yes, there is.

Mr. NICKLES. I appreciate that.

Why is that OK in the Senator's office but we are going to tell those in construction that they are going to have to pay everybody who works for them $40,000 or $50,000 a year even though some tasks are semiskilled such as sweeping, cleaning up, picking up tools, or using a shovel. Why should we tell them they have to pay $40,000 or $50,000 a year, but the Senator has people in his office that do not make $40,000 or $50,000 a year? I do not understand.

Mr. ADAMS. The Senator has just never been on a construction job.

Mr. NICKLES. That is not correct.

Mr. ADAMS. He would not have said that to me because there are a whole series of people on every construction job in this Nation ranging all the way from journeymen to helpers, to apprentices. We used to have masters. We do not have masters anymore out on the job. And they are paid at differing rates and differing amounts.

These people are trained or not trained. They are paid according to their training. This particularly applies to both construction trades and the trades in the highways. And a lot of it is very dangerous.

In other words, I do not go to an operating engineer out there when I am carrying a hod or my son is carrying a hod, who does not know what he is doing. I want him paid $26 an hour.

There are people in my office who make more than that. They had training for more than that. There are people who make less and have less training.

What the Senator is saying is that the whole classification system is going to be changed by fiat by the Labor Department and I am saying to him simply I do not believe we should do that.

Mr. NICKLES. If the Senator will yield further, that is not what I am saying. What I am saying is I do not

think—if the Senator is talking about highway construction. I did work in highway construction and I worked on the lower semiskilled classification. I will tell the Senator I was not paid a journeyman wage. I was not paid the same amount as the construction worker that had the skills, that knew how to lay the concrete.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. NICKLES. I ask unanimous consent for an additional 5 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. NICKLES. If my colleague will focus again, the facts are if we do not allow these regulations to go forward you are going to be mandating that the high school students, which I was when I worked in highway construction, are paid journeyman's rates.

Mr. ADAMS. No. Wait a minute.

Mr. NICKLES. Let me finish the question.

The PRESIDING OFFICER. Does the Senator from Oklahoma have a question for the Senator from Washington?

Mr. NICKLES. Why in the world would the Senator want to pay a person—let us take myself. I was a high school student working in highway construction. If I was working on a Federal highway, the Senator is saying that I should be paid journeyman's rates?

Mr. ADAMS. I did not say that.

Mr. NICKLES. If the Senator will yield, because under the Senator's amendment you are not going to allow a helper or semiskilled classification to even be in existence even if it is the prevailing practice. Why would you not allow me to be paid what I should be paid instead of mandating that I be paid a journeyman's rate?

Mr. ADAMS. I cannot believe this. There are all kinds of classification out there on that highway. The Senator was not paid journeyman wages. I am not going to pay

everybody, including operating engineers, journeyman wages for the job that they carry on.

You have people out there on every job in a whole series of classifications, running from the people that are operating heavy equipment, dangerous equipment, operating engineers down to apprentices who are sweeping, which is what you were doing, which is what my son did, to people who are very skilled carpenters to helpers doing nothing but hammering nails.

What you are attempting to do is to say that this system, which has grown up through the years of people having differing classifications of work—and we have done away with a lot of the restrictions on classifications so that people can move from one thing to another—but you are saying you are going to use unskilled people out there.

I am not defining on any job that everybody is going to be paid $26 an hour, any more than I do in my office, or you do in yours. On those jobs, people are paid according to their skills and according to their training, and you go down and get them at the hiring hall, and you know what you get. And if you get a bad one, you send them back.

This has been the struggle that has gone on in the industry for a long time. All you are going to do with your amendment, and the Department of Labor is going to do, is build a lot of shoddy stuff in America and drive down what we have already.

Mr. NICKLES. Mr. President, I appreciate my colleague's response, but I totally disagree. I wish he were correct, but he is not.

The facts are, what we are trying to do is to allow a helper classification, if it is the prevailing practice in an area or a community. Under the existing rules, there was no "semiskilled" or helper classification. The Department of Labor thinks there should be.

I might tell my friend and colleague, who thinks that this began in the Reagan administration, he is incorrect. It actually began in the Carter administration in Inter-

agency Review of Contract Wage Laws, options paper, they knew the system was not working. They knew they could save billions of dollars if they followed common industry practices of allowing semiskilled classifications. But the old regulations did not allow it.

And so we are denying thousands of people this entry-level job. They were not going to hire DON NICKLES, a high school or college student, to work on these projects because I was not worth $20 an hour. Back then it was less than that. But no, they did not do that.

If we do not pass my amendment, we are going to be denying economic opportunity for thousands of people.

I totally disagree with my colleague's statement, and also my colleague from Iowa, who said, you need Davis-Bacon to have quality construction. This is totally false. That is like saying the Government buildings are built better than private-sector buildings, and frankly, it is just the opposite. We pay more for Federal Government buildings, but we get less quality. We paid $137 million for the Hart Building. I mean, that is a lot of money.

Look at the expense for Federal buildings. Compare it to the expense and quality for private-sector buildings, and there is no comparison. I move out of the Federal building in my offices in Oklahoma City and in Tulsa, and saved money by going to the private sector. And I will tell you, our offices are better than what they were in the Government building. And I saved the taxpayers money.

Government buildings cost a lot of money. They cost too much money. One of the reasons is Davis-Bacon. And one of the reasons is because Davis-Bacon does not have a classification for helpers, for semiskilled workers. They require that evedybody be paid journeyman's rate. In some cases, they might have an apprentice program.

It is interesting to note that also part of the regulation they are trying to strike eliminates a Department of Labor regulation dealing with the apprentice program. The Department of Labor has been working with or-

ganized labor and business trying to come up with revised, updated apprentice regulations, and they are trying to kill those, too.

And Senator ADAMS said, well, he had a friend that spoke against the apprentice regulation. He was one of thousands of people who testified on the apprentice regulations. There has been years of work going into those regulations. And without a hearing, with the stroke of a pen, they say we are just going to eliminate the regulations proposed by the Department of Labor. They are seeking to eliminate the regulations dealing with both helpers and apprentices.

They are going to make it more difficult for a person to become an apprentice. They are going to make it more difficult for a person to become a helper, to get a job in a semiskilled capacity. They are going to drive the cost of buildings up. And to say that Government buildings built under Davis-Bacon are better than private-sector buildings is just totally, completely false. They are going to waste billions and billions of dollars. The administration estimated $623 million to be wasted next year alone.

Frankly, I think we have a big enough deficit already. We need to save money. We are talking now about real money. We are talking about hundreds of millions of dollars a year. And yet people say, "Oh, no, let us eliminate that regulation." So we put in a little paragraph on a bill nobody is going to pay any attention to, and that little paragraph is going to cost $2 billion in the next 5 years. That is totally irresponsible. And it is irresponsible for the thousands of people who are not going to get a job. What about the unemployed black youth in Chicago that would like to have a chance, that would like to work on one of those Federal building construction projects. He would like to work as a beginning laborer building a housing project or maybe a road? He is going to be denied the opportunity because he will not be worth the minimum wage that they pay at that project with a journeyman's wage, and it may well be $18 an hour. He

does not have any skills to offer, and they do not have a semi-skilled classification in many areas. Therefore, he is out of luck. He is unemployed. He is going to be sitting on his hands. Maybe he is going to be collecting unemployment; maybe he is going to be involved in drugs or crime.

And that is a travesty that we ought to try and eliminate. We ought to try and give him an opportunity. We ought to try and let him at least work on many of these Federal construction projects as he can on the private side. Why deny him that opportunity just because it happens to be paid for by the Federal Government? Why mandate the buildings built by the Federal Government have to cost a lot more than buildings built by the private sector? I think that is ridiculous.

Again, I say to my colleagues, you do not pay everybody in your office $50,000 a year or $45,000 a year. You ought to look at some of these wage classifications. And if they are worth it, I think it is fine, but I do not think it makes sense to pay somebody $22 an hour if really the market would dictate they should only be paid $7 an hour.

I do not think that helps the individual either.

Basically, what it does is it means they will not get the job.

So I would just urge my colleagues to adopt this amendment, and we will debate it further in the morning.

Mr. President, I yield back the remainder of my time.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The absence of a quorum has been suggested. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. NICKLES. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HELMS. Mr. President, I am pleased to be a cosponsor of the amendment offered by my good friend from Oklahoma, Senator NICKLES.

As he has explained, this so-called dire supplemental appropriations bill has become a Christmas tree for legislative initiatives. The provision that our amendment will strike was inserted in the bill to prohibit the Secretary of Labor from implementing the final regulations under Davis-Bacon that would allow the employment of semi-skilled helpers on federally financed construction projects. That is both unwise, and unfair, and I urge my colleagues to join us in stripping it from this bill.

Mr. President, after 9 years of litigation, the Federal courts have determined that the helper regulations are fully consistent with the long-stated intent of the Davis-Bacon Act that Federal construction contracts reflect locally prevailing wages. The proposed revisions to the regulations were published after 2 years of open and public debate. It is unfair for Congress to sneak in at the last hour and circumvent that process.

Even though the use of helpers in construction contracts is widespread, the Federal Government is prohibited from allowing their use in Federal contracts. As a result, many small and minority contractors simply walk away from Federal contracts. This is unfair to them, and it costs the taxpayers hundreds of millions of dollars.

The Office of Management and Budget will save approximately $500 million in budget authority and $200 million in outlays in fiscal year 1992. OMB has also estimated that after the regulations are fully phased in, they will save about $600 million each year.

Mr. President, as we face the worst budget crisis in history, it is foolish for Congress to attempt to block the implementation of these regulations. Furthermore, it is unwise to block an effort that will open up competition for Federal contracts to small and minority firms.

I commend my friend from Oklahoma for his work on this issue, and I urge my colleagues to vote to delete the provisions that would block the implementation of the helper regulations.

Mr. KENNEDY. Mr. President, I oppose the motion to strike offered by my colleague from Oklahoma.

The provision my colleague seeks to strike from this bill prohibits the Secretary of Labor from expending funds to implement or administer either the Department's new Davis-Bacon regulations regarding the use of helpers or its proposed revisions to the apprenticeship regulations to the extent those revisions affect apprenticeship programs in the construction industry.

I support the inclusion of this provision because the combined impact of these regulations would be to undermine the craft apprenticeship system which has proved so effective in producing a well-trained, highly skilled construction work force.

The new helper regulations would allow contractors working on Federal and federally assisted construction to replace apprentices enrolled in certified training programs with low-wage, low-skilled helpers with no employment training and no opportunity for advancement.

The proposed apprenticeship regulations would downgrade Federal standards for apprenticeship programs and prevent States from enforcing standards that are higher than the Federal standards.

At a time of mounting national concern about the deteriorating skill levels of the American workforce, it is disturbing that the Department of Labor should be promoting measures that can only accelerate this downward trend.

Ironically, at the same time the Department is promoting regulations that would undermine the building trades apprenticeship system, that system is being held up as a model of effective skills training.

The Commission on Skills of the American Workforce, cochaired by former Labor Secretaries Ray Marshall and Bill Brock, pointed out in its recent report that apprentices are part of the small minority of workers in this country who receive extensive, systematic, long-term skills training.

The Office of Technology Assessment, in its recent report on worker training, said the apprenticeship model, combining classroom instruction with hands-on practice and skill training, is a highly effective approach to technical training which is particularly well-suited to the needs of smaller companies.

The Department of Labor itself has recognized the value of the apprenticeship system. The Department's report on work-based learning, issued last year by Secretary Dole, states that "the apprenticeship concept of structured on-the-job training, combined with classroom instruction, is an ideal model for learning the job-specific skills needed by today's workers."

In that same report, the Department says that we need more Government incentives to encourage employers to adopt structured work-based training programs and points out that one of the few incentives that do exist are the Davis-Bacon Act wage provisions, which "have traditionally been a strong incentive to train within the construction industry."

Now, however, the Department seems bent on implementing regulations that will effectively eliminate the provisions in the Davis-Bacon Act that provide incentives for employers to invest in workforce training.

If allowed to go into effect, the new helper regulations would permit contractors on federally funded construction projects to replace up to 40 percent of the current workforce with lower paid and lower skilled helpers, and to assign work currently performed by laborers, apprentices or skilled journeymen to the lower-paid helper classifications.

Moreover, and most importantly, contractors would not be required to provide or pay for any training for these helpers.

This is directly contrary to current law, which generally permits contractors to pay reduced wages to workers who do not have the full range of skills necessary to command a journeyman wage only if those workers are enrolled in an approved apprenticeship or training program.

The requirement that the worker be enrolled in an apprenticeship program ensures that those lower-paid workers will in fact receive training to enable them to progress through a structured training program and acquire the full range of skills necessary to become a journeyman.

This is good for the industry, because it assures the existence of a pool of highly skilled craft workers to meet the industry's workforce needs. It is also good for the workers, because it provides entry-level employees with opportunities for advancement and the acquisition of marketable, portable skills.

In place of that system, the new regulations will result in the creation of a new, permanent subclass of workers consigned to low-skilled, dead-end jobs that are not only low-paid, but offer no opportunity for advancement.

Because the new regulations eliminate incentives for employers to participate in formal training programs, it will be increasingly difficult for those contractors who are willing to invest in training for their workers to support those programs, and to compete with employers who don't pay for worker training.

In the long run, the construction industry and the Nation as a whole will suffer because the absence of bona fide apprenticeship and training programs will result in a shortage of fully qualified laborers and journeyman capable of performing a wide range of skilled tasks and supervising the work of others.

One person who has closely examined the new helper regulations is Dr. John T. Dunlop, formerly Secretary of

Labor under President Ford and currently Acting Director of the Business and Government Center of the John F. Kennedy School of Government at Harvard.

What he says about the new regulations is that they are—and I quote—"a skill dilution program enabling employers to turn over journeymen's work to jacks of all trades—without a training component—who will have little chance of improving their economic or social position."

"Today, there are almost 200,000 apprentices in formal construction training programs acquiring technical skills which will enrich the present and future manpower resources of this country. Contractors will now have little economic incentive to support apprenticeship programs. Can this country over the long run afford this loss of its most vital private skill training program? Is the Government then prepared to advance the costs of supporting such a system?

I say the answer is "No," and I urge you join with me in preventing the Department from continuing on this ill-conceived course.

What are the arguments made in favor of these regulations?

The administration claims they will save the Government $600 million a year in Federal construction costs, but that's just not true.

The notion that using untrained low-wage helpers to construct our public works and public building will result in substantial cost savings for the Federal Government has been examined and rejected by Dr. Dunlop, who is the leading construction industry economist in the country.

Dr. Dunlop spent many years administering Government-imposed wage controls in the construction industry —after World War II, during the Korean conflict, and again in the early 1970's as Chairman of the Construction Industry Stabilization Board, and he is probably more familiar than any other person in the country with

the impact of the Davis-Bacon Act on the construction industry.

As he explains, the administration's supposed cost savings come from simply taking the current wage rates and subtracting the lower rates that will be paid to the helpers who will replace laborers and journeyman.

But from an economist's viewpoint, he says, that methodology is totally unsupportable and in fact "proves nothing":

> [I]n the real world helpers are used in a system which requires more supervisors and uses less journeymen than the system that does not use helpers. While * * * wage costs may be lower, labor costs may be higher because of the greater cost of supervision. Also increased use of helpers quite frequently leads to lower productivity of workers, or inferior products. * * * There is simply no sound basis for gratuitously assuming that lower wage rates in the construction industry generally mean lower costs to the public. * * *

The administration also claims that the new helper regulations will somehow expand employment opportunities in construction for women and minorities—and that's equally specious.

Besides apprentices, the bulk of the workers who would be displaced as a result of the new helper regulations would be construction laborers, and the fact, is that a substantial percentage of the laborer work force is already composed of women and minorities. Indeed in 1989, a full 40 percent of the laborers trained by the Laborers—Associated General Contractors Educational and Training Fund were women or members of minority groups.

If the new helper regulations are implemented, these are the people who will either lose their jobs or be forced to accept the lower wage helper jobs, losing access not only to training, but to the opportunity for advancement that goes with it.

As Judge Harold Greene said in striking down an earlier version of these regulations, the expanded use of helpers, rather than improving employment opportunities for women and minorities, "will assign (women and minorities) to the lowest classification of workers, and is likely to keep them there on a permanent or long-term basis."

This is not something we should be promoting as a matter of national labor policy.

APPENDIX N

CONGRESSIONAL RECORD—SENATE

Wednesday, March 20, 1991

(Legislative day of Wednesday, February 6, 1991)

DIRE EMERGENCY SUPPLEMENTAL APPROPRIATIONS

The ACTING PRESIDENT pro tempore. Under the previous order, there will now be 15 minutes of debate on the Nickles amendment No. 51, to be equally divided by the Senator from Oklahoma [Mr. NICKLES] and the Senator from Massachusetts [Mr. KENNEDY] with a vote following thereon. The clerk will report the bill.

The legislative clerk read as follows:

> A bill (H.R. 1281) making dire emergency supplemental appropriations for the consequences of Operation Desert Shield/Desert Storm, food stamps, unemployment compensation administration, veterans' compensation and pensions, and other urgent needs for the fiscal year ending September 30, 1991, and for other purposes.

The Senate resumed consideration of the bill.

Pending:

> Nickles amendment No. 51, to strike section 303, which prohibits the increased use of semiskilled workers on Federal construction projects and barring implementations of revised apprenticeship programs.

The ACTING PRESIDENT pro tempore. Who yields time?

Mr. NICKLES addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from Oklahoma [Mr. NICKLES].

Mr. NICKLES. Mr. President, I yield myself 3 minutes.

The ACTING PRESIDENT pro tempore. The Senator is recognized for 3 minutes.

AMENDMENT NO. 51

Mr. NICKLES. Mr. President, to bring my colleagues up to date, last night I introduced an amendment that would strike section 303 from the bill we have before us, H.R. 1281. This section would prohibit the Department of Labor from implementing the helper regulations. Let me add that the National Federation of Independent Business has indicated this will be listed as one of its key small business votes.

These are regulations that go all the way back to the Carter administration. They were originally discussed in an options paper by Secretary Marshall in President Carter's administration. They have been supported by subsequent administrations, including both the Reagan and the Bush administration. Secretary Dole came up and implemented these regulations, along with the present Labor Secretary, Lynn Martin.

Mr. President, the language that is in the appropriations bill would say that not one dime can be spent to implement these regulations. In other words, there can be no helper classification for Federal construction projects. The net result of this would be to waste billions of dollars. The Secretary of Labor estimates that next year alone, if these regulations are not allowed to go forward, it would cost an additional $623 million. That is $623 million that would be wasted if we do not adopt the amendment I have proposed today.

Mr. President, more important than the cost to the taxpayer is the fact that we will be denying thousands upon thousands of disadvantaged, unemployed persons from participating in the workplace. I think that makes

no sense. I think we want to open up the doors of economic opportunity.

If we do not implement the helper regulations, we will be mandating that contractors pay journeyman wages to semiskilled workers. Many of these jobs are entry-level jobs, they are learning jobs, and they should command a pay scale of $7 or $8 an hour but instead we are going to mandate that they be paid $20 an hour. It does not make economic sense and it is not fair for the worker because we are going to be denying the unemployed person, the opportunity to get the job.

Mr. KENNEDY addressed the Chair.

The PRESIDENT pro tempore. The Senator from Massachusetts [Mr. KENNEDY].

Mr. KENNEDY. Mr. President, I yield myself 3 minutes.

The PRESIDENT pro tempore. The Senator is recognized for 3 minutes.

Mr. KENNEDY. Mr. President, during the debate yesterday evening on the Nickles amendment, the Senator from Oklahoma made some statements about what will happen if the Department of Labor is prevented from implementing the new helper regulations which reflect a serious misunderstanding of the way the Davis-Bacon Act works.

I am referring particularly to his statements that if the helper regulations are not put into effect, there will be no jobs for semiskilled workers on Federal construction projects and employers will have to pay all their employees journeyman wages.

I believe he used the example that employers would have to pay workers $22 an hour to sweep floors.

Let me set the record straight, because this is really a gross misstatement of the act's requirements.

The Davis-Bacon Act does not require, and has never required, that every worker on a construction site be paid full journeyman wages. The unskilled and semiskilled work on construction projects covered by Davis-

Bacon has always been performed by laborers, and by apprentices, who are typically paid at rates much lower than the rates for journeymen craft workers—and certainly not at rates that are anything like $22 an hour.

The provision we are debating would in no way prohibit contractors on Federal construction projects from continuing to employ unskilled or semi-skilled workers as laborers and apprentices at below-journeyman wage rates. It would however, prevent employers from being able to force those workers into lower-paid helper classifications with reduced wages and benefits and no opportunity to obtain the training necessary to advance to a higher-paid classification.

Contrary to the assertions of the Senator from Oklahoma, implementation of the new helper regulations would not create new opportunities for entry-level workers to climb the economic ladder. In fact, the opposite is true. By allowing contractors to replace laborers and apprentices with lower-wage helpers, the new helper regulations would in effect kick that ladder down.

For those who seek to learn a skilled trade, the building trades apprenticeship system has been the route by which hundreds of thousands of unskilled entrants to the job market, through a combination of on-the-job training and classroom teaching, have been able to acquire the skills to enable them to become fully qualified journeyman craftsmen and craftswomen able to command a journeyman wage.

The beginning apprentice, like an unskilled or semi-skilled helper, is paid just a fraction of the journeyman's wage. But unlike the helper, who is permanently consigned to that low-wage classification, the apprentice enrolled in a certified apprenticeship program knows that as she progresses through the program, her wages will increase along with her skill level, and eventually she will be able to graduate to journeyman status.

So let's not pretend that we would be doing entry-level construction workers a service by undermining the ap-

prenticeship system and replacing existing jobs for apprentices with low-paid helper jobs.

And what about the impact of the new regulations on construction laborers, who struggle to earn a decent living digging trenches, hauling materials, moving equipment, and otherwise helping and assisting skilled journeymen on the jobsite?

Like many other workers on the lowest rungs of the economic ladder, a substantial proportion of these workers are women and minorities. If the new helper regulations are implemented, these are the workers who will either be replaced by lower-paid helpers or forced to accept lower-paid helper jobs.

The Senator from Oklahoma claims that the new regulations would enhance minority employment. But that's not what Judge Harold Greene of the U.S. District Court for the District of Columbia concluded when he examined the proposed helper regulations. To the contrary, it was his conclusion that the expanded use of helpers on Federal construction projects was "likely to have the effect of allowing contractors to replace higher wage minority laborers with lower wage minority helpers."

As Norman Hill, president of the A. Philip Randolph Institute has stated, minority workers are "particularly vulnerable to exploitation such as the Davis-Bacon Act is designed to prohibit." Let's ensure that we keep those protections against exploitation intact.

Mr. President, it is interesting to listen to my friend from Oklahoma talk about these regulations and how the Department of Labor is supporting his proposal when just last year under this Republican administration the Department issued some key findings on the training of America's workers. The Department's report on work-based learning states that, "The one area in which opinions are most consistent is in the support for apprenticeship as a method of training and its expansion to skilled occupations throughout American industry. The supporting rationale is that the apprenticeship concept of struc-

tured on-the-job training, combined with classroom instruction, is an ideal model for learning the job-specific skills needed by today's workers."

This is a report the Department of Labor published last year. The findings in this report are also supported by former Labor Secretary Ray Marshall and former Senator Brock in the report of the Commission on the Skills of the American Work Force, which they co-chaired, which also cites the apprenticeship system as one of the few models we have in this country for systematic, long-term skills training.

The Senator from Oklahoma claims that all kinds of savings will result from implementation of the new regulations. But Dr. John Dunlop, the most thoughtful, knowledgeable construction labor economist in this country—and a Republican, Mr. President—says this about the methodology used by the Office of Management and Budget in concluding that the Government will save money if workers on Government-funded construction projects are paid less: "There is simply no sound basis for gratuitously assuming that lower wage rates in the construction industry generally mean lower cost to the public.

With all due respect, Mr. President, I think what we ought to be about is not destroying the existing apprenticeship system; what we ought to be doing is perfecting that system; what we ought to be doing is trying to find ways that it can be more effective.

I am amazed that at a time when we are trying to find new ways of forging partnerships such as we find in the apprenticeship system between workers and employers, and new ways at the national level to encourage employers to participate in training programs, that the Department is seeking to undermine this kind of partnership effort. The training programs which are available for unskilled and under-skilled workers in construction are just the kinds of programs that are necessary for us to develop in other areas.

So I hope the amendment will not be successful. I reserve the remainder of my time.

Mr. ADAMS. Mr. President, I rise today in strong support of the language contained in H.R. 1281 that would direct the Department of Labor to stop wasting tax dollars in its two pronged attack on the rights of workers in our country. Simply stated, the Labor Department is continuing on with a decade long effort to undermine the prevailing wage standard in the Davis-Bacon law that protects the integrity of wages paid on Federal projects. By proposing to expand the definition of helper, DOL would replace up to 40 percent of the current Davis-Bacon work force with lower-paid, unskilled workers who would have little or no formal training.

This new underclass of workers would be disproportionately represented by women and minorities, working in frequently dangerous jobs with little chance for advancement. Proponents of this erosion of Davis-Bacon argue, as always, that we will save money. There is no secret why: exploiting a work force has always been a short-term means of saving money. But is it the right thing to do? Mr. President, I suggest that it is not. And if this administration is so convinced that amending the Davis-Bacon law serves any legitimate interest, let them send us up a bill. Our committee will give it the full hearing it deserves, and then we can vote on it. The administration knows that Congress is not inclined to begin cutting back on workers wages on Federal projects. And what they cannot accomplish legislatively, they should not be attempting to do through the regulatory process.

The other side of this attack on workers rights comes through the Labor Department's effort to destroy State apprenticeship programs. In my State, an excellent apprenticeship program exists under State law, with a council appointed by the Governor with representatives of both labor and management. The comments filed on

behalf of the Washington State Department of Labor Director Joe Dear which were included following my remarks last night, are typical of the more than 60,000 comments in opposition to the proposed changes in apprenticeship rules filed with the Department of Labor. Quite bluntly, the citizens of my State would not welcome a change in Federal law that would allow an apprenticeship program from some other State to set up shop in Washington State without obtaining approval from Washington State. And once again, I believe the administration should submit a legislative proposal to Congress, for hearings before the proper committees of legislative jurisdiction if it believes the apprenticeship system should be revamped.

Mr. President, I want to compliment Chairman BYRD for maintaining this restriction within H.R. 1281, particularly since this provision received overwhelming support in the House by a 244-to- 173 margin. It is particularly noteworthy that in both bodies, the chairmen of the legislative committees of jurisdiction, Education and Labor in the other body, and Labor and Human Resources here, both support this provision. This language provides Congress with an opportunity to put a stop to the regulatory mischief that has been going on at DOL during much of the past decade. This mission of the U.S. Department of Labor is to protect the interests of the working men and women of this Nation. These proposed regulations would be more appropriate coming from a Department of Management, or a Department of Big Business, rather than from a Department of Labor.

Mr. President, I may sound a bit old fashioned when I remind my colleagues that the American labor movement has paid a great price, and made a great contribution to American society down through the years. For the Federal Government to try to erode that progress by a nickle and dime attack on wage rates and training programs would be a disgrace.

Yes; we do need to develop programs and strategies that will help our Nation's work force compete in the changing global economy in which we live.

And yes, we do need to retrain many of our workers to take those jobs that are coming on line.

But Mr. President, we also need to shackle the rogue elephants that are loose at the U.S. Department of Labor who are trying to rewrite the law without congressional approval. This language will accomplish that objective.

To those who claim we could save money by implementing these changes, I say:

We are spending billions to bail out the savings and loan cesspool, working people are picking up that bill;

We are sending billions of dollars in United States aid to countries from Afganistan to Zaire and hundreds of points in between; American workers pay for those programs; and

We forgive the foreign debts of countries that join us in battle, or who begin to make democratic changes in their societies; American workers bear the cost of those decisions.

Here today, with this language, we have an opportunity to stand up and be counted for the wage levels paid to American workers. I am happy to join with those of my colleagues who support American workers and their wage levels and training needs. I urge a vote against the amendment offered by the Senator from Oklahoma. Now is the time and this is the opportunity to put the U.S. Department of Labor back on course, protecting the American worker.

The PRESIDING OFFICER (Mr. ROCKEFELLER). Who yields time?

Mr. NICKLES. Mr. President, I yield Senator SYMMS from Idaho 1 minute.

The PRESIDING OFFICER: The Senator from Idaho.

Mr. SYMMS. Mr. President, I rise in support of the Nickles amendment.

This amendment would strip the bill of irrelevant legislative language preventing the administration from implementing Davis-Bacon regulations.

It is bad enough that we are poised to pass a so-called dire emergency supplemental domestic appropriations bill which will spend $4.7 billion—all only shortly after we raised gas, beer, and tobacco taxes because we had supposedly cut spending to the bone.

It is even worse that a little noticed paragraph was slipped in that would prevent the Secretary of Labor from executing administrative reforms that, when fully phased in about 3 years from now, will save the Government $600 million a year in construction and repair costs.

After a long process of hearings, review, and rulemaking, the Labor Department has finally promulgated regulations which recognize a separate class of helpers for purposes of determining Davis-Bacon prevailing wages on Federal and federally financed construction projects.

These regulations have been subject to extensive litigation. They have been reworked and retooled over 9 long years. A wide panoply of judges from all segments of the political spectrum have determined conclusively that these helper regulations are consistent with the purposes of the Davis-Bacon Act.

The litigants, unable to obtain satisfaction from the courts, are attempting to do an end-run around the regulatory and judicial process—at a cost of $600 million to the American taxpayer.

Mr. President, the regulations which this act seeks to overturn are quite modest. Helpers can only be used where the practice is not just identifiable, but prevailing —according to a complex formula which will mean that most firms, doing most of the work in a locality, already must be using helpers before the Labor Department allows Federal contractors to employ them as well.

Furthermore, a Federal construction contractor could not employ more than two helpers for every three jour-

neymen. In addition, a helper could not be substituted for a skilled journeyman and, in fact, would have to be under the direct supervision of a journeyman. Finally, the work done by a helper would have to be substantially unskilled or semiskilled in nature, involving tasks such as carrying, holding, preparing a work area, and so forth.

These changes, while modest, would nevertheless save $200 million in the first year and $600 million a year later on.

Mr. President, H.R. 1281 will not be viewed as one of the Senate's prouder achievements. But the Senate can at least avoid adding insult to injury through the adoption of the Nickles amendment.

Mr. President, it is bad enough that we are poised to pass a so-called dire emergency supplemental bill which will spend $4.7 billion right on the heels, I might remind my colleague, on raising the taxes of the working American, on gasoline, on beer, on tobacco, on about anything else Congress can think of just last year, and now we are back here asking to spend more money, but even worse this little-noticed paragraph was slipped in that would prevent the Secretary of Labor from being able to execute administrative reforms which, when fully phased in, would save the Government $600 million in construction repair costs.

Mr. President, it is outrageous how antiworker, anticapitalistic the Congress has grown in these recent years when the rest of this world is asking for opportunities for their people to work and save and invest and own property, and we sit in there and rigidly force Government to intervene between the workers and opportunties, at the same time costing these taxpayers more money.

I ask unanimous consent that I be added as a cosponsor of this very fine amendment.

The PRESIDING OFFICER. Without objection, it is so ordered. Who yields time?

Mr. NICKLES. I yield the Senator from Vermont 1 minute.

Mr. JEFFORDS. Mr. President, few subjects have generated more controversy over the years than proposed changes to the Davis-Bacon Act, a statute that is now some 60 years old but has been largely unchanged in that time.

I had thought there were three schools of thought on this issue—repeal it, leave it alone or reform it. I count myself in the last category. I support the act, and what I consider to be the fundamental purpose of the act—that the Federal Government should not undercut local wages and working conditions.

The helper regulations have been through 9 years of regulatory and judicial pulling and hauling. What has emerged is absolutely true to the purpose of the act.

If a majority of the workers in private construction are working on jobs with helpers, then the Federal Government can use helpers on its jobs, too.

This is hardly a radical concept, in fact, I think this is the only job classification that must show majority status before it is permitted.

This is a reasonable safeguard. These regulations will permit some contractors to use helpers on Federal projects where helpers represent essentially the majority practice in an area.

That saves money, Workers will be paid helper rates for helper work, rather than the journeyman premium now paid. That is why this rider will cost $2 billion over the next 5 years unless the Nickles amendment is adopted.

I do not know of a single union general contractor in the State of Vermont. So far as I know, all of them use helpers. Yet when it comes time to bid on a Federal job, they are forced to conform their practices to the Federal Government's—not the other way around. This is the exact opposite of what I thought Davis-Bacon was supposed to do.

Today we don't have three schools of thought—we have just two. If you agree that the purpose of Davis-Bacon

should be to mirror local wages and working conditions, then you should support this amendment.

If you believe that the taxpayers should pay a yearly premium of $500 million in order to preserve the work rules of the minority of workers in an area, then you should vote against this amendment.

It is that simple.

The PRESIDING OFFICER. Who yields time?

Mr. KENNEDY. How much time remains?

The PRESIDENT OFFICER. The Senator has 5 minutes.

Mr. KENNEDY. Mr. President, I yield myself 3 additional minutes.

Mr. President, it seems to me that those who want to strike this provision do not understand the importance of apprenticeship training programs. These are over 200,000 Americans participating in apprenticeship programs who are not only getting skills but also getting some educational benefit.

Now, if you are going to undermine these privately funded construction industry programs, where is the Government going to get the money to provide training for construction workers and for other skills?

Since the Department published the proposed new apprenticeship regulations last fall, it has received thousands of negative comments, not just from workers and worker organizations in the construction industry, but also from employers who are committed to work force training and States which are currently playing an important role in carrying out the objectives of the National Apprenticeship Act. The Apprenticeship Council in my own State of Massachusetts has advised the Department that it strongly opposes the proposed regulations because they would prohibit States from establishing minimal apprenticeship standards for programs operated within their jurisdictions.

During her confirmation proceedings, the new Secretary of Labor, Lynn Martin, advised that the Depart-

ment is attempting to resolve the issues raised by opponents of the new regulations and indicated that she was prepared to work with the Labor and Human Resources Committee to revise the regulations to address those concerns. I appreciate that commitment and I am fully prepared to work with her on this matter.

The provision the Senator from Oklahoma seeks to strike in no way prevents the Secretary from proceeding with efforts to come up with revisions that will achieve the Department's stated goal of expanding the concept of apprenticeship to industries and occupations that do not have an apprenticeship tradition, a goal which I share. It simply ensures that in the meantime, no funds will be expended to implement revisions that would undermine existing, effective apprenticeship programs in the construction industry.

All we are saying is let us preserve the existing regulation and try to find ways to work with the administration. If there are some aspects of the existing regulations that we can improve or strengthen, we will be glad to do it. But why jeopardize existing programs that have been evalauted and reevaluated and each time come up with shining colors.

Mr. President, I hope that the Senate will not accept this amendment, and at the appropriate time I will move for the yeas and nays.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. NICKLES. Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator has 2 minutes 50 seconds.

Mr. NICKLES. Mr. President, I wish to clarify something my good friend and colleague, Senator KENNEDY, has alleged, that this would undo the apprenticeship program. That is totally false. As a matter of fact, the language that I am trying to strike would throw out revisions to the apprenticeship regulations that the De-

partment of Labor has been working on with organized labor and business groups that have not even been finalized. They throw out those proposed regulations as well. The language says not 1 dime should be spent on implementing regulations dealing with helpers and dealing with apprenticeship programs.

Again, I tell my friends and colleagues that this goes all the way back to even President Carter's Labor Secretary who suggested that we need to make some changes in helpers. We need to allow helpers because that is a common practice throughout private construction industry. Contractors have helper classifications except for when they do business with the Federal Government. They are prevented from having a helper classification or a semiskilled classification when they do business with the Federal Government.

The chairman of the Appropriations Committee has worked hard to try to keep us within our spending caps. If we do not adopt this amendment, we are going to waste $523 million next year and over the next 5 years nearly $3 billion.

Again, I say more importantly, we are going to be denying thousands of people the opportunity to get into construction of Federal buildings. Why should we pass a law which mandates they should be paid $20 an hour? The marketplace will not hire them at that level and they will be denied the opportunity to work.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. My good friend ought to understand that if we prevent the Department of Labor from implementing the proposed revisions to the apprenticeship regulations, we leave intact the existing regulations. This does not eliminate the existing regulations.

Finally, Mr. President, there is, I think, no one in this body who does not have respect for John Dunlop. He has reviewed the claim that savings would result from the new helper regulations and this is what he said.

While * * * the wage costs may be lower, labor costs may be higher because of the greater cost of supervision. Also increased use of helpers quite frequently leads to lower productivity of workers, or inferior products. * * * There is simply no sound basis for gratuitously assuming that lower

* * * *

When more supervisors are needed, that will tend to balance off any assumed helper savings. If "helpers" cannot do the job as quickly as a qualified mechanic, then there may be no cost savings in fact. These and myriad other inquiries suggest that cost savings can only be arrived at after a comparative cost determination on the increased use of helpers, taking into account all relevant factors.* * *

There is simply no sound basis for gratuitously assuming that lower wage rates in the construction industry generally mean lower costs to the public without looking at the total costs of the system used.

Let me conclude with one final point. Dr. Dunlop served in a Republican administration. He chaired the Construction Industry Stabilization Committee in the early 1970's. The purpose of the Stabilization Committee was to control costs in the construction industry. Dr. Dunlop is no friend to runaway spending in this industry. He has presented to us a sound analysis of the impact of this new helper regulation and one that costs serious doubt on the Department's proposition that using untrained helpers will create lower wage costs. In fact, it most likely will create higher labor costs on public construction. This will cost the Federal Government and not save it one penny, contrary to the claims we have heard today.

Mr. AKAKA. Mr. President, I rise in opposition to the amendment offered by the Senator from Oklahoma [Mr. NICKLES] to delete language from H.R. 1281, the dire emergency supplemental appropriations bill for fiscal year 1991, prohibiting the Department of Labor from implementing its new helper or apprenticeship regulations.

Mr. President, both of these regulations would seriously

weaken the Davis-Bacon Act and would have a detrimental impact upon thousands of construction workers currently protected by Davis-Bacon. The adverse consequences of these regulations would include: widespread job losses for skilled workers employed on Federal and federally assisted construction projects; the creation of a permanent class of poorly trained, unskilled, and low-paid workers; and the serious disruption of existing apprenticeship programs.

Over the past decade, Congress has repeatedly rejected all efforts to weaken the Davis-Bacon Act on the issue of helper regulations. Thwarted in the legislative arena, the U.S. Department of Labor resorted to the regulatory process to accomplish its objectives on this issue. The Department chose to implement its new regulations despite a pending court challenge and the recommendation of the Senate Appropriations Committee to defer any such action until the conclusion of the appeals process.

In a letter emphasizing the administration's strong opposition to the language contained in section 303 of H.R. 1281, the Secretary of Labor writes that the administration also opposes, and I quote, "legislating substantive labor policy in an appropriations bill." Further, the administration asserts that an appropriations bill is inappropriate as a "vehicle for introducing significant reversals in established governmental policies."

Mr. President, drastic measures require drastic responses. I believe the regulatory process is an inappropriate manner in which to circumvent the legislative process and expressed will of the Congress. The defeat of this amendment will reaffirm the objectives of the Davis-Bacon Act which Congress has repeatedly and consistently supported over the course of the past 55 years.

The same holds true for the proposed changes in apprenticeship regulations finalized by the Labor Department. Hawaii is 1 of 30 States and territories that would see its State apprenticeship councils abolished under the proposed regulations. Additionally, these changes would

preempt a State's ability to set program standards higher than minimum Federal levels, render the apprenticeship system unenforceable by abolishing ratio requirements of apprentices to journeymen, and reduce the overall quality and standards of instruction and training established by existing State apprenticeship programs.

Mr. President, current regulations have served us well for many years. I stongly oppose any effort by the administration and the Department of Labor to circumvent congressional jurisdiction and weaken the Davis-Bacon Act.

Mr. CHAFEE. Mr. President, I intend to vote against this amendment to strike language from the dire emergency supplemental legislation. Specifically, the amendment offered by my distinguished colleague from Oklahoma would permit the Department of Labor to begin implementing its final regulatory changes regarding the worker category known as helpers.

For more than a decade I have watched and participated in debates regarding the merits of the Davis-Bacon Act. It is clear to me that for this reform to be successful the Senate Labor Committee must put politics aside and take a long, hard look at the inflationary effects of the Davis-Bacon Act.

Last summer, Senator METZEMBAUM and Senator KENNEDY joined me in support of an amendment to the National Affordable Housing Act directing the General Accounting Office to put together a study on the strengths and weaknesses of the Davis-Bacon Act. Regrettably, that provision was dropped during the conference committee with the House of Representatives.

Congress should reexamine the Davis-Bacon Act. To what extent does it prevent many small and minority-owned businesses from bidding on federally funded construction projects? To what degree does it distort the prevaling wage scale in parts of the country? Does the act artificially drive up the cost of building and construction for the Federal Government? These are a few ques-

tions that must be definitively and authoritatively answered by an independent, nonpartisan, group before we can agree on the need for Davis-Bacon reform. I urge the Labor Committee to make such an effort a priority for this Congress.

The PRESIDING OFFICER. All time of the Senator from Oklahoma has expired.

The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, I yield back remainder of my time. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

The clerk will call the roll.

Mr. BYRD. Mr. President, I ask unanimous consent to speak for 30 seconds.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BYRD. Mr. President.

> The year's at the spring
> And day's at the morn;
> Morning's at seven;
> The hillside's dew-pearled;
> The lark's on the wing;
> The snail's on the thorn;
> God's in his heaven—
> All's right with the world.

The PRESIDING OFFICER. The question is on agreeing to the amendment. The yeas and nays have been ordered. The clerk will call the roll.

The legislative clerk called the roll.

The result was announced—yeas 37, nays 63, as follows:

[Rollcall Vote No. 35 Leg.]

YEAS—37

Bond
Boren
Brown
Burns
Coats
Cochran
Cohen
Craig
Danforth
Dole
Domenici
Garn
Gorton
Gramm
Grassley
Hatch
Helms
Jeffords
Kassebaum
Kasten
Lott
Lugar
Mack
McCain
McConnell
Nickles
Nunn
Pressler
Roth
Rudman
Seymour
Simpson
Smith
Symms
Thurmond
Wallop
Warner

NAYS—63

Adams
Akaka
Baucus
Bentsen
Biden
Bingaman
Bradley
Breaux
Bryan
Bumpers
Burdick
Byrd
Chafee
Conrad
Cranston
D'Amato
Daschle
DeConcini
Dixon
Dodd
Durenberger
Exon
Ford
Fowler
Glenn
Gore

Graham
Harkin
Hatfield
Heflin
Heinz
Hollings
Inouye
Johnston
Kennedy
Kerrey
Kerry
Kohl
Lautenberg
Leahy
Levin
Lieberman
Metzenbaum
Mikulski
Mitchell
Moynihan
Murkowski
Packwood
Pell
Pryor
Reid
Riegle
Robb
Rockefeller
Sanford
Sarbanes
Sasser
Shelby
Simon
Specter
Stevens
Wellstone
Wirth

So the amendment (No. 51) was rejected.

Mr. MITCHELL. Mr. President, I move to reconsider the vote.

APPENDIX O

DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, EDUCATION, AND RELATED AGENCIES APPROPRIATIONS FOR 1992

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON APPROPRIATIONS HOUSE OF REPRESENTATIVES ONE HUNDRED SECOND CONGRESS

FIRST SESSION

SUBCOMMITTEE ON THE DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, EDUCATION, AND RELATED AGENCIES

WILLIAM H. NATCHER, Kentucky, *Chairman*

NEAL SMITH, Iowa
DAVID R. OBEY, Wisconsin
EDWARD R. ROYBAL, California
LOUIS STOKES, Ohio
JOSEPH D. EARLY, Massachusetts
STENY H. HOYER, Maryland
ROBERT J. MRAZEK, New York
CARL D. PURSELL, Michigan
JOHN EDWARD PORTER, Illinois
C. W. BILL YOUNG, Florida
VIN WEBER, Minnesota

MICHAEL A. STEPHENS, ROBERT L. KNISELY, SUSAN E. QUANTTUS, MARK J. MIODUSKI, and JOANNE L. ORNDORFF, *Subcommittee Staff*

PART 1

DEPARTMENT OF LABOR

	Page
Secretary of Labor	1
Employment and Training Administration	239
Labor-Management Services	793
Pension Benefit Guaranty Corporation	867
Employment Standards Administration	1161
Occoupational Safety and Health Administration	529
Mine Safety and Health Administration	615
Bureau of Labor Statistics	109
Department of Management	951
Office of the Inspector Geenral	707

Printed for the use of the Committee on Appropriations

Tuesday, March 5, 1991.

EMPLOYMENT STANDARDS ADMINISTRATION: SALARIES AND EXPENSES; SPECIAL BENEFITS; BLACK LUNG DISABILITY TRUST FUND

WITNESSES

SAMUEL D. WALKER, ACTING ASSISTANT SECRETARY FOR EMPLOYMENT STANDARDS ADMINISTRATION

CARI M. DOMINGUEZ, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

JOHN R. FRASER, ACTING ADMINISTRATOR FOR WAGE AND HOUR DIVISION

LAWRENCE W. ROGERS, DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

ELEANOR H. SMITH, DIRECTOR, DIVISION OF FINANCIAL MANAGEMENT

RICHARD A. STAUFENBERGER, DIRECTOR, OFFICE OF MANAGEMENT, ADMINISTRATION AND PLANNING

JAMES E. McMULLEN, DIRECTOR, OFFICE OF BUDGET, DEPARTMENT OF LABOR

Mr. EARLY [presiding]. The 1992 budget request from the Employment Standards Administration. Our witness is Sam Walker, Acting Assistant Secretary. I apologize for the delay, we are having a full committee meeting. We are marking up the President's dire emergency supplemental, and it is going to go a lot longer than we anticipated.

We will start the hearing. Mr. Walker?

Mr. WALKER. Thank you, Mr. Chairman.

Good afternoon, Mr. Chairman, and members of the subcommittee. My purpose today is to present the Em-

ployment Standards Administration's fiscal year 1992 budget request.

Introduction of Witnesses

Before I do that, I would like to introduce those who appear with me today at the table. They are, I think, officials of distinction and uncommon quality. Jim McMullen from the Budget Office joins us. John Fraser is Acting Administrator of the Wage and Hour Division and has held many other responsibilities within ESA. Cari Dominguez is Director of the Office of Federal Contract Compliance Programs. Eleanor Smith is ESA's budget officer. Larry Rogers is Director, Office of Workers' Compensation Programs, and has done an extraordinary job there, I believe; and Dick Staufenberger, formerly Mr. Rogers' deputy and now our very able Director of Management, Administration and Planning.

Opening Statement

Mr. Chairman, we have requested $263,806,000 and 3,912 FTE. This is a net increase of $18,761,000 and seven FTE over the comparable fiscal year 1991 levels. In addition to funding for normal inflationary costs, our request includes two program increases and an appropriation language change.

I want first to summarize these aspects of the request. Then I will generally describe ESA's planned activities in fiscal year 1992.

For the Wage and Hour program, we are requesting 13 FTE and $750,000 to implement the Davis-Bacon "helper" regulations. The full implementation of these regulations could save the government a very substantial amount each year on Federal and Federally-financed construction projects.

The Federal Employees' Compensation Program is requesting 50 staff-years and $2,805,000 to start a four-

year project to review the periodic roll and implement other cost savings measures. These changes will produce a savings in wage-loss benefits. Importantly, they will also provide better medical services and opportunities for rehabilitation for injured workers.

FECA is also requesting language authorizing a four-year assisted reemployment demonstration project. This creative project will use compensation funds to pay employers some of the costs they incur when they hire injured Federal workers. The employer's costs charged to the compensation fund will be no more than the benefits paid to an employee who is reemployed under this project. The program expects that this will increase its ability to return injured workers to meaningful employment.

I would now like to generally describe ESA's activities for fiscal year 1992.

Mr. Chairman, budget constraints and additional responsibilities under recently-passed legislation, including the Immigration Nursing Relief Act of 1989, the Immigration Act of 1990, and the Americans with Disabilities Act, have required ESA to reorder some of its priorities, particularly in the enforcement area.

In both Wage-Hour and OFCCP, we will focus on servicing complaints on a timely basis. Wage-Hour will continue to carry out an effective program of directed enforcement, seeking out the most serious violators of labor standards within its domain. The issuance of timely and accurate wage determinations for government contracts will also continue to be a priority.

OFCCP will be changing the focus of some of their compliance reviews, particularly in the construction area, where they will be reviewing all of the contractors on a site, rather than just one or two. The program will also continue efforts to target women and minorities in non-traditional jobs, including mid and upper-level positions.

In OWCP, we will focus on ensuring that the interests of eligible workers, employers and the Federal government are properly protected throughout all phases of the claims management process.

I should note, on this score, an important achievement for FECA in fiscal year 1990 was the completion of the project to replace the computer system in the FECA program. All FECA offices were converted to the new system by last November, and in fiscal year 1991,

* * * *

ESA-16

Funding for Wage and Hour during the last five years has been as follows:

1987	$78,018,000
1988	$81,909,000
1989	$89,229,000
1990	$90,736,000
1991	$91,295,000

1992 Budget Request

Resource levels requested are for $97,336,000 and 1,460 full-time equivalent (FTE) staff years. The requested funding includes an additional 13 FTE and $750,000 to effectively implement the Davis-Bacon helper regulations.

In September 1990, the U.S. District Court lifted an injunction which had previously prohibited the implementation of the helper regulations. Under these regulations, Davis-Bacon wage determinations based on surveys completed after February 4, 1991, must indicate where the use of helpers prevails and specify the prevailing wages for such occupational classifications. The regulations also permit the "conformance" process to be used to add helper classifications to existing wage determinations if the Division finds that the use of helpers is the prevailing practice

for an occupational classification in the locality. The requirement that the use of a particular helper classification be found to be prevailing in a given area creates a significant increase in Wage and Hour wage determination workloads. Upon full implementation of the regulations, it is estimated that there will be a savings to the government on Federal and Federally-financed construction projects that could reach $610 million per year.

In addition to personnel costs, funding is requested to acquire computer-assisted telephone inquiry technology and additional construction contracting data to be used by wage determination data collectors in the conduct of its wage and prevailing practice survey program.

With respect to FLSA enforcement, priority will continue to be given to servicing complaints on a timely basis while carrying out an effective program of directed enforcement. The purpose of all FLSA enforcement is to ensure that the minimum wage, overtime, recordkeeping, and child labor provisions of the Act are being complied with by employers. Employers who are not in compliance and are found to owe employees back wages are asked to pay the amounts owed voluntarily. In cases that cannot be settled administratively the Department is authorized to undertake legal action.

Government contract labor standards investigations will primarily service complaints. Efforts to improve issuance of accurate wage determinations on a timely basis under both the Davis-Bacon and the McNamara-O'Hara Service Contract Acts will continue.

ESA-20

Changes for 1992

Activity Changes:

Built-in:

Within-grades and promotions	$1,245,000
One day of additional pay	304,000
Annualization of pay increases effective January, 1991	716,000
Annualization of executive pay increases	54,000
Pay increases effective January, 1992	2,149,000
Locality pay	550,000
Federal Employees' Compensation Fund	12,000
Travel and transportation	125,000
Other rental, printig, and other services	959,000
Supplies and equipment	16,000
Space rent	777,000
Working Capital Fund	241,000
Total Built-in	7,150,000
Net Program	−$1,109,000
FTE	−25

Enforcement of Wage and Hour Standards

Proposal: To provide a funding increase of $750,000 and 13 FTE for the Wage and Hour Division for implementation of the Davis-Bacon helper regulations.

Rationale: The proposed increase in staff and funding is required to determine where helper classifications and rates can be incorporated into existing wage determinations based on a finding that use of a particular helper classification prevails on construction projects in a given area.

The Davis-Bacon and Related Acts (DBRA) require payment of locally prevailing wages to laborers and mechanics on Federal or Federally-assisted construction projects. Existing regulations generally prohibit use of helpers on

Federal projects. This has often meant that contractors reclassified and paid their helpers higher journeyman rates to continue using their customary work force, or used higher paid journeymen to perform lesser-skilled tasks normally done by their helpers. As a result, the contractor's costs on DBRA work, and therefore the costs to the government, have been substantially higher than what would have been incurred on private, non-DBRA work.

APPENDIX P

HOUSE OF REPRESENTATIVES

102d Congress — Report
1st Session — 102-121

DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES APPROPRIATION BILL, 1992

JUNE 20, 1991.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

Mr. NATCHER, from the Committee on Appropriations, submitted the following

REPORT

[To accompany H.R. 2707]

The Committee on Appropriations submits the following report in explanation of the accompanying bill making appropriations for the Departments of Labor, Health and Human Services (except the Food and Drug Administration, Indian Health Service, and the Office of Consumer Affairs), and Education (except Indian Education), Action, the Corporation for Public Broadcasting, Federal Mine Safety and Health Review Commission, the National Commission on Acquired Immune Deficiency Syndrome, the National Commission on Libraries and Information Science, the National Commission to Prevent Infant Mortality, the National Council on Disability, the

National Labor Relations Board, the National Mediation Board, the Occupational Safety and Health Review Commission, the Prospective Payment Assessment Commission, the Physician Payment Review Commission, the Railroad Retirement Board, the United States Soldiers' and Airmen's Home, the United States Institute of Peace and the United States Naval Home for the fiscal year ending September 30, 1992 and for other purposes.

INDEX TO BILL AND REPORT

	Page number	
Title I—Department of Labor:	*Bill*	*Report*
Employment and Training Administration....	2	7
Labor-Management Services	8	15

44-327

The Employment Standards Administration is involved in the administration of numerous laws, including the Fair Labor Standards Act, the Immigration and Nationality Act, as amended, the Migrant and Seasonal Agricultural Workers' Protection Act, the Davis-Bacon Act, the Federal Employees' Compensation Act (FECA), the Longshore and Harbor Workers' Compensation Act, and the Federal Mine Safety and Health Act (Black Lung).

The Committee has approved 3,912 full-time equivalent (FTE) staff for this agency, an increase of 7 FTE over the comparable level in FY 1991. The 3,912 FTE includes 324 FTE financed by a transfer of $30,145,000 from the Black Lung Disability Trust Fund.

The bill includes a program increase of 50 FTE and $2,895,000 for the FECA program for the periodic roll initiative.

The Committee has been informed by the Department of Labor that it is in compliance with the permanent prohibition contained in the Dire Emergency Supplemental Appropriations Act of 1991 concerning implementation of the Davis-Bacon helper regulations. The Committee believes therefore that the Department of Labor's request for additional funding to implement the Davis-Bacon helper regulations is unnecessary. Section 303 of the Dire Emergency Supplemental Appropriations Act of 1991 (P.L. 102-27) permanently prohibits the Secretary of Labor from expending any funds to implement or administer the helper regulations.

Built-in increases of $17,891,000 are included for such items as Federal pay raises, within-grade increases, career ladder promotions, locality pay, executive pay, an extra day of pay, Federal Employees' Compensation Fund, space rent, travel, transportation of things, printing, utilities and other rent, supplies, equipment, and Working Capital Fund.

The Committee has approved reductions of 43 FTE and $2,025,000 related to budget constraints in the Wage Hour, OFCCP, and Black Lung programs.

SPECIAL BENEFITS

The bill includes $192,000,000, a decrease of $130,000,000 below the FY 1991 comparable amount of $322,000,000, and the amount of the budget request. This appropriation primarily provides benefits under the Federal Employees' Compensation Act (FECA). The payments are prescribed by law.

The total amount estimated to be available in FY 1992, including anticipated reimbursements from Federal agencies of $1,503,000,000, is $1,979,321,000, an increase of $34,000,000 over the total amount available in FY 1991. The estimated amount for obligations in FY 1992 is $1,690,000,000. The remaining estimated unobligated

balance of $289,321,000 will carry over into FY 1993 and remain available until expended.

The Committee recommends appropriation language that provides authority to use the FECA fund for a demonstration project in which the Secretary may reimburse a new employer for a portion of the salary of a newly reemployed injured Federal worker. The FECA fund will be used to reimburse new employers during the first three years of employment not to exceed 75% of salary in the worker's first year, 50% in the second year, and 25% in the

* * * *

APPENDIX Q

SENATE

102d Congress
1st Session

Report
102-104

DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES APPROPRIATION BILL, 1992

JULY 11 (legislative day, JULY 8), 1991.—
Ordered to be printed

Mr. HARKIN, from the Committee on Appropriations, submitted the following

REPORT

[To accompany H.R. 2707]

The Committee on Appropriations, to which was referred the bill (H.R. 2707) making appropriations for the Departments of Labor, Health and Human Services, and Education and related agencies for the fiscal year ending September 30, 1992, and for other purposes, reports the same to the Senate with various amendments and presents herewith information relative to the changes recommended.

Amount of budget authority

Amount of House bill	$203,998,247,000
Amount of Senate bill over House bill	+322,768,000
Total bill as reported to Senate	204,321,015,000
Amount of adjusted appropriations, 1991	183,040,909,000
Budget estimates, 1992	200,611,414,000
The bill as reported to the Senate:	
Over the adjusted appropriation for 1991	+21,280,106,000
Over the budget estimates for 1992	+3,709,601,000

* * * *

crease of $1,821,000 for built-in items such as personnel compensation, travel, rent, and contractual services is also provided.

The recommendation includes the bill language recommended by the administration and adopted by H.R. 1281, the Dire Emergency Supplemental Appropriations Act, 1991 (Public Law 102-27). This bill language deletes the word "contractual" and the words "legal and financial". These changes will enable the Corporation to continue to spend outside its administrative expense limitation for any purpose in connection with the termination of pensions. Expenses related to pension plan terminations are unpredictable. The Committee recognizes the need for immediate response by the Corporation to take over pension plans to limit losses and this vital work could be seriously hampered by the time delays associated with the normal appropriations process. This bill language would not affect Fededal outlays since the off-budget trust fund would reimburse the on-budget revolving fund for these expenses.

EMPLOYMENT STANDARDS ADMINISTRATION

Appropriations, 1991	$215,153,000
Budget estimate, 1992	232,626,000
House allowance	232,626,000
Committee recommendation	231,326,000

The Committee recommends an appropriation of $231,326,000 for the Employment Standards Administration, which is $1,300,000 less than the administration request and the House allowance. The recommendation is $16,173,000 more than the fiscal year 1991 comparable appropriation of $215,153,000. Also included is authority to expend $1,035,000 from the special fund established by the Longshore and Harbor Workers Compensation Act, which is the amount requested and provided by the House.

The Committee has approved 3,899 full-time equivalent [FTE] staff for this agency, a decrease of 6 FTE's from the comparable number in fiscal year 1991. This number includes staff that are financed by a transfer of $30,145,000 from the black lung disability trust fund.

The Employment Standards Administration administers employment standards programs under several laws, including the Fair Labor Standards Act, the Immigration Reform and Control Act of 1986, the Employment Polygraph Protection Act of 1988, the Migrant and Seasonal Agricultural Workers' Protection Act, the Davis-Bacon Act, the Federal Employees' Compensation Act [FECA], the Longshore and Harbor Workers' Compensation Act, and the Federal Mine Safety and Health Act (black lung); and assures nondiscrimination and affirmative atcion for minorities, women, veterans, and handicapped workers by administering Executive Order 11246, as amended, affirmative action provisions of the Rehabilitation Act of 1973, as amended, and the Veteran Era Veterans' Readjustment Assistance Act of 1974.

The Committee recommendation includes a program increase of 50 FTE's and $2,895,000 to the FECA Program for the periodic roll initiative. A requested increase of 13 FTE's and $750,000 is denied the Wage Hour Program reflecting the permanent prohibition on implementation of the Davis-Bacon helper regulations enacted in section 303 of Public Law 102-27. The Committee has been informed by the Department of Labor that it is in compliance with the permanent prohibition contained in the Dire Emergency Supplemental Appropriations Act of 1991 concerning implementation of the Davis-Bacon helper regulations. The Committee believes, therefore, that the Department of Labor's request for additional funding to implement the Davis-Bacon helper regulations is unnecessary. Section 303 of the Dire Emergency Supplemental Appropriations Act of 1991 (Public Law 102-27) permanently prohibits the Secre-

tary of Labor from expending any funds to implement or administer the helper regulations.

The Committee recommendation also includes funding for built-in increases such as Federal pay raises, within-grade increases, career ladder promotions, locality pay, executive pay, an extra day of pay, Federal employees' compensation fund, space rent, travel, transportation of things, printing, utilities and other rent, supplies, equipment, and working capital fund.

The Committee reiterates its position that there will be no black lung field office closings in West Virginia.

The Committee has approved requested program reductions of 56 FTE and $2,775,000 related to decreased costs and budget consraints in the Wage Hour, Office of Federal Contract Compliance, and Black Lung Programs. The amount for executive direction activities has been reduced $550,000 below the request, to restrain funding at the fiscal 1991 level.

SPECIAL BENEFITS

Appropriations, 1991	$322,000,000
Budget estimate, 1992	192,000,000
House allowance	192,000,000
Committee recommendation	192,000,000

The Committee concurs with the budget request of $192,000,000 for special benefits. The recommendation is $130,000,000 under the fiscal year 1991 appropriation and the same as the House allowance and the budget request.

The account provides funding necessary to meet required payments for compensation, medical costs, vocational rehabilitation, and other benefits to those individuals eligible to assistance under the Federal Employees' and Longshore and Harbor Workers' Compensation Acts.

The $192,000,000 provided for this entitlement account consists of $188,000,000 for payments under the Federal

Employees' Compensation Act [FECA] and $4,000,000 under the Longshore and Harbor Workers' Compensation Act.

The Committee recommends appropriation language that provides authority to use the FECA fund for a demonstration project in which the Secretary may reimburse a new employer for a portion of the salary of a newly reemployed injured Federal worker. The FECA fund will be used to reimburse new employers during the first 3 years of employment not to exceed more than 75 percent of salary in the workers' first year, 50 percent in the second year, and 25 percent in the third year. The Secretary is authorized to ex-

* * * *

APPENDIX R

HOUSE OF REPRESENTATIVES

102d Congress
1st Session

Report
102-282

MAKING APPROPRIATIONS FOR THE DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES. FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1992, AND FOR OTHER PURPOSES

NOVEMBER 1, 1991.—Ordered to be printed

Mr. NATCHER, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 2707]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 2702) "making appropriations for the Departments of Labor, Health and Human Services, and Education, and related agencies, for the fiscal year ending September 30, 1992, and for other purposes," having met after full and free conference, have agree to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its amendments numbered 22, 28, 31, 32, 33, 34, 40, 63, 69, 70, 74, 75, 76, 77, 80, 82, 84, 86, 97, 98, 105, 110, 120, 121, 125, 127, 144, 152, 153, 157, 159, 160, 169, 173, 185, 189, 190, 196, 198, 203, and 204.

That the House recede from its disagreement to the amendments of the Senate numbered 1, 2, 20, 30, 61, 81, 85, 89, 92, 100, 103, 104, 106, 107, 123, 128, 131, 138, 146, 147, 148, 155, 162, 163, 165, 166, 171, 174, 175, 177, 182, 183, 184, 192, 208, 211, and 212, and agree to the same.

Amendment numbered 4:

That the House recede from the disagreement to the amendment of the Senate numbered 4, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$63,000,000*; and the Senate agree to the same

Amendment numbered 5:

That the House recede from its disagreement to the amendment of the Senate numbered 5, and agree to the same with an amendment, as follows:

In lieu of the sum proposed by said amendment insert *$77,644000*; and the Senate agree to the same.

Amendment numbered 6:

(3) the employees retain ownership of the model garments after the display period; and

(4) the model garments are in fabrics, styles and sizes determined by the employees to be appropriate for the employees use.

The conference agreement reflects the permanent prohibition on implementation of the Davis-Bacon helper regulations enacted in section 303 of Public Law 102-27.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

SALARIES AND EXPENSES

Amendment No. 18: Appropriates $304,157,000 instead of $302,107,000 as proposed by the House and $35,207,000 as proposed by the Senate. The conference

agreement includes an increase of $1,250,000 over the House bill for the on-site consultation program. The conferees agree that up to $450,000 shall be used to provide for replacement equipment for the national consultation laboratory. The agreement includes sufficient funds to annualize costs of district offices without reducing safety and health coverage elsewhere in the region as proposed by the Senate.

Amendment No. 19: Specifies two or more employees hospitalized instead of one or more as proposed by the House and five or more as proposed by the Senate. The conferees are agreed that the action taken on this amendment shall not be construed to require OSHA to revise its employment accident reporting requirements that are imposed by regulation. Any changes to the current reporting requirements would have to be accomplished through the normal regulatory process. The conference agreement includes bill language under amendment number 9 to clarify this matter.

Mine Safety and Health Admistration
salaries and expenses

Amendment No. 20: Appropriates $185,364,000 as proposed by the Senate instead of $186,157,000 as proposed by the House.

The conferees are agreed that the agency is to submit semi-annual reports with regard to mandatory annual inspections. This should be done by February 1 and August 1 of each year.

Bureau of Labor Statistics
salaries and expenses

Amendment No. 21: Appropriates $256,924,000 instead of $258,504,000 as proposed by the House and $223,293,000 as proposed by the Senate.

Amendment No. 22: Makes available $50,399,000 from the Unemployment Trust Fund as proposed by the House instead of $48,599,000 as proposed by the Senate.

The conference agreement includes the following increases over fiscal year 1991: $16,100,000 and 96 FTE's for the improvement of Federal economic indicators, $15,750,000 and 140 FTE's for the Federal Employees Pay Comparability Act and $3,581,000 for executive direction and staff services. The confereees approve the BLS nation-

* * * *

APPENDIX S

CONGRESSIONAL RECORD—HOUSE

H 10856

November 22, 1991

DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 1992

Mr. NATCHER. Mr. Speaker, pursuant to the order of the House on Thursday, November 21, 1991, I call up the bill (H.R. 3839) making appropriations for the Departments of Labor, Health and Human Services, Education, and related agencies, for the fiscal year ending September 30, 1992, and for other purposes.

The Clerk read the title of the bill.

Mr. NATCHER. Mr. Speaker, all time yielded will be for the purposes of debate only.

Mr. Speaker, I yield myself 4 minutes.

Mr. Speaker, the bill I present today replaces H.R. 2707, which was vetoed by the President on Tuesday. This veto was based on his objections to the provision of the bill related to abortion counseling in family planning clinics. As Members know, the House failed to override this veto by a vote of 276 to 156. The number of votes against the override was identical to the number who voted against the conference report on November 6. As a result, we have had to start over with a new bill.

I want to emphasize that the new bill I identical to the bill vetoed by the President, with the single exception of section 514, the abortion counseling provision. Section 514 has been stricken in its entirety. All of the dollar amounts are identical to the vetoed bill and all the terms, conditions and limitations are as agreed to in the conference on H.R. 2707. The committee expects the in-

structions contained in the House and Senate reports and the conference report on H.R. 2707 as well as floor debates to apply to the new bill. I will insert in the RECORD at the end of my statement a table comparing the amounts provided in the new bill to those in the House, Senate, and conference versions of H.R. 2707.

It is clear that the abortion counseling provision provokes deeply held beliefs on both sides. I urge my colleagues to support this new bill. It represents the best we can do for the many important programs that are funded within it. The longer we delay in passing a second bill, the more these critical activities will be hurt.

At the present time, the programs of the Departments of Labor, Health and Human Services, and Education are funded at the rate specified in the continuing resolution. This rate is the lower of the 1991 level, or the House or Senate passed bills. Compared to the levels in the vetoed bill. The continuing resolution provides $4.6 billion less in discretionary budget authority. To cite a few examples of programs that are being shortchanged by the continuing resolution:

	Million
Chapter 1	— 631
National Institutes of Health	— 839
Low-income energy assistance	— 500
Education for the handicapped	— 239
Student financial assistance	— 171
Vocational education	— 184

It is not right for these programs and many others like them that do so much to improve the health of our country and the education of our children to be further jeopardized while we debate the abortion counseling matter. I urge my colleagues to support this new bill. The table which I referred to earlier follows:

* * * *

APPENDIX T

CONGRESSIONAL RECORD—SENATE

November 22, 1991

LABOR-HHS APPROPRIATIONS

Mr. FORD. Mr. President, I now ask unanimous consent that the Senate proceed to the immediate consideration of H.R. 3839, the Labor-HHS appropriations bill, just received from the House; that no amendments to the bill be in order; that the bill be deemed read three times, passed, and the motion to reconsider be laid upon the table.

The PRESIDING OFFICER. Without objection, it is so ordered.

The bill (H.R. 3839) was deemed read a third time and passed.

• Mr. HARKIN. Mr. President, I rise reluctantly in support of H.R. 3839, the fiscal year 1992 Labor, Health and Human Services, Education, and related agencies appropriations bill. The bill is identical to H.R. 2707 with one exception: section 514 of that bill, the language adopted by the House and Senate in identical form to prohibit the administration from implementing the gag rule, has been deleted.

The conference report on H.R. 2707 passed the Senate on November 7, by a vote of 73 to 24. The President vetoed the bill on November 19, and the House failed to override the President's veto on November 20, with a vote of 276 to 156. Earlier today, the House passed the new bill, H.R. 3839, by a vote of 359 to 56. All the report language included in House Report No. 102-121 and Senate Report No. 102-104 as modified by the conference report language included in Conference Report 102-282 apply in full to H.R. 3839; all the floor colloquies that were provided as further guidance on H.R. 2707 also apply fully to H.R. 3839.

Mr. President, earlier I said that I support adoption of H.R. 3839 reluctantly. I say reluctantly because it is a sad day for America when the President vetoes a $204.9 billion education, health, job training, and human services appropriations bill because he objects to language included in the bill guaranteeing American women full and complete medical information.

In order to preserve the gag rule the President was willing to put at risk almost $205 billion intended for maternal and child health, unemployment assistance, education funding for Pell grants and chapter I, nutrition programs for the elderly, immunization programs for children, and NIH bio-medical research to help us find cures for many diseases that afflict mankind, and many other programs. It's ironic that the self-appointed Education President vetoed a bill that provides $31.9 billion for education programs, 9 percent more than last year.

Mr. President, unfortunately since the House was unable to override the President's veto, we are now forced to adopt this new legislation deleting language overturning the gag rule.

I fully supported overturning the gag rule and I continue to support overturning it. I believe the gag rule is misguided, reactionary, and inappropriate public policy. The gag rule prevents health professionals from fully informing their patients. That does not make any sense.

Why on Earth would we want to insert the Government into a doctor's examining room? Supporters of the gag rule must think women are unable to make decisions for themselves. Supporters of the gag rule must think the Federal Government should make women's most intimate and personal choices.

I find that attitude patronizing, paternalistic—pathetic. It is ridiculous on its face and grossly unfair to women.

Next year we will revisit this issue. Even though the President may be able to gag the doctors in title X clinics, he will not silence American women and he will not silence this Senator, I will continue to fight for the right of American women to be informed and for the right of American women to choose.•

APPENDIX U

□ 1320

Mr. NATCHER. Mr. Speaker, I yield such time as he may consume to the gentleman from Texas [Mr. STENHOLM].

(Mr. STENHOLM asked and was given permission to revise and extend his remarks.)

Mr. STENHOLM, Mr. Speaker, I rise in support of H.R. 3839.

Mr. Speaker, I rise today to clarify a small, but important, issue raised in this appropriations bill.

This bill includes report language denying the request of the Department of Labor for additional funds for the Wage and Hour Division to implement and administer regulations allowing the use of semiskilled helpers on Federal and federally assisted construction subject to Davis-Bacon. The report language asserts that the prohibition rider included in section 303, Public Law 102-27, the dire emergency supplemental appropriations of 1991 which forbid the Secretary of Labor from expending any funds for the implementation of the helper regulations was permanent.

Although the report language implies that the permanence of the prohibition is a settled question, there has been considerable disagreement on this point. In an effort to resolve this question, I asked the Congressional Research Service to review this issue and advise me of its opinion. I am inserting the memorandum that CRS sent in response to my request. Briefly, the memorandum stated that there were no "words of futurity" to overcome the presumption against permanence in appropriations acts. Therefore, in the opinion of the American Law Division of CRS, the prohibition on the regulation would likely be held to be temporary.

The appropriations bill includes $1,341,274,000 in funding for the Employment Standards Administration.

Among the responsibilities of the Employment Standards Administration is to make prevailing wage determinations. The Federal district court in Washington has determined that the helper regulations are consistent with the Secretary of Labor's authority to make prevailing wage determinations. Accordingly, there is no statutory restraint preventing the Department of Labor from reissuing the regulations.

CONGRESSONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
Washington, DC, June 18, 1991.

To: The Honorable Charles Stenholm,
attention: Ed Lorenzen.

From: American Law Division.

Subject: Expiration Date of Prohibition on Funds to Implement Davis-Bacon Regulations in Appropriations Act.

This memorandum is in response to your letter of June 10, 1991, concerning section 303 of Public Law 102-27, the Dire Emergency Supplemental Appropriations Act of 1991, 105 Stat. 151. This section prohibits the expenditure of funds to administer or implement certain regulations relating to the Davis-Bacon Act and to apprenticeship programs:

Sec. 303. Notwithstanding any other provision of law, no funds shall be expended by the Secretary of Labor to implement or administer the regulations published at 54 Federal Register 4234-44 (January 27, 1989) to be codified at 1.7(d), 5.2(n)(4), 5.5(a)(1)(A) and 5.5(a)(4)(iv) of title 29 of the Code of Federal Regulations or to implement or administer any other regulation that would have the same or similar effect. No funds shall be expended by the Secretary of Labor to implement or administer revisions to part 29 of title 29 of the Code of Federal Regulations published at 55 Federal Register

34868-34876 (August 24, 1990) to the extent such revisions affect apprenticeship programs in the construction industry.

Your question is whether the prohibition is permanent or will expire at the end of the fiscal year covered by the Appropriation Act.

It should be noted at the outset that the rulings of the Comptroller General are final and binding on officers of the Executive Branch with respect to the legality of expenditures from the United States Treasury. Accordingly, this memorandum is in the nature of an advisory opinion setting forth the factors to be considered, and the principles to be applied by the Comptroller General in determining the scope and extent of a limitation or restriction on the use of appropriated funds.

In general, "it is well settled that Congress can amend substantive legislation by a provision in an appropriations act." 62 Comp. Gen. 54, 57 (1982). On the other hand, "[t]here is a presumption that any provision in an annual appropritaion act is effective only for the covered fiscal year. . . . This is because appropriation acts are by their nature non-permanent legislation. Thus, unless otherwise specified, the provisions of an appropriations act for a given fiscal year expire at the end of that fiscal year." 65 Comp. 588, 589 (????). Accordingly," a provision contained ?in? an appropriation act may not be construed as permanent legislation unless the language or nature of the provision makes it clear that such was the intent of Congress. 62 Comp. Gen. 54, 56 (1982); 10 Comp. Gen. 120, 121 (1930)." 65 Comp. Gen. 588, 589 (1986).

The Dire Emergency Supplemental Appropriations Act of 1991 makes supplemental appropriations for the "fiscal year ending September 30, 1991." Public Law 102-27, enacting clause, 105 Stat. 130, Apr. 10, 1991. The provision in question would therefore be presumed to expire on September 30, 1991.

"Permanency is indicated most clearly when the provision in question includes 'words of futurity' such as 'hereafter' or 'after the date of approval of this act.'" 65 Comp. Gen. 588, 589 (1986). The words "none of the funds appropriated by this Act or any other Act may be obligated or expended" do not constitute words of futurity in the view of the Comptroller General, but merely extend the effect to the provision to other appropriations available in that fiscal year. 65 Comp. Gen. 588, 589 (1986).

The provision in question contains no words of futurity to overcome the presumption of against permanence in appropriations acts.

The use of words of futurity is not essential where "the permanent character of the legislation is otherwise indicated." 9 Comp. Gen. 248, 249 (1929). "One indication of permanence is when the provision is of a general nature, bearing no relation to the objects of the appropriation act," 65 Comp. Gen. 588, 590 (1986). For example, if the provision restricts funding for a program which has been funded by the appropriations act itself, then it is presumed to be a nonpermanent nature.

The provision in question limits the expenditure of funds by the Secretary of Labor to implement or administer regulations pertaining to the Davis-Bacon Act. The Appropriations Act makes appropriations for the Department of Labor relating to state unemployment insurance and employment service operations, amends appropriation language pertaining to Pension Benefit Guaranty Corporation Fund, and makes available funds for veteras employment and training. The Act, however, does not appear to appropriate funds for the Davis-Bacon Act or for the offices which implement and administer that law in the Department of Labor.

This consideration is therefore ambiguous, since the provision "bears some relation to" the objects of the Act

by making appropriations for the Department of Labor, but not for purposes of implementing or administering the Davis-Bacon Act. On balance, this aspect does not appear to be sufficient to overcome the presumption against permanence.

"Permanency of an appropriation act provision may also be indicated when the provision would be rendered or meaningless were it not interpreted to be permanent legislation. 62 Comp. Gen. 54, 56 (1982). This is a corollary of the rule of statutory construction that a statute should not be construed in a way which renders it wholly ineffective." 65 Comp. Gen. 588, 590 (1986). A provision will be held to be permanent where an interpretation that it is not permanent would "strip the section of any legal effect." 62 Comp. Gen. 54, 56 (1982).

The provision in question would not be rendered ineffective if it were held to be nonpermanent. It would still bar the expenditure of any funds until September 30, 1991.

The Comptroller General usually looks to the legislative history to confirm the interpretation of an appropriation act provision, but does not rely on legislative history alone to overcome the statutory presumption that provisions in appropriation acts do not constitute permanent legislation unless expressly provided otherwise. 56 Comp. Gen. 588, 590 (1986). Where there are ambiguities and conflicting statements in the legislative history, that history is not conclusive in determining the intent of Congress with regard to the permanence of the provision. 56 Comp. Gen. 588, 593 (1986). Under principles of statutory construction, statements of the sponsor of a bill during deliberations on the bill are given consideration by the courts since other legislators look to the sponsor to be particularly well informed about the bill's purpose, meaning, and intended effect. 65 Comp. Gen. 352, 355 (1986).

The provision was added to the appropriations bill in committee. An amendment was offered on the floor to delete the provision from the bill, and debate ensued. 137 Cong. Rec. H1526 (Mar. 7, 1989). The sponsor of the provision, Representative Murtha, did not speak, but supporters were led by Representative Ford. Mr. Ford stated that changes in Davis-Bacon authorization legislation." He noted that legislation addressing the same issue had been adopted by the House, but that no amendments had been finally agreed upon by the Conference Committee. and that "authorizing legislation is the only appropriate vehicle for dealing with fundamental changes in the operation of the Davis-Bacon Act. I support the Murtha amendment because it protect the legislative prerogative in this important area." 137 Cong. Rec. H1528 (Mar. 7, 1989).

Mr. Ford also stated that the "Murtha amendment would simply prohibit the implementation of the proposed apprenticeship regulations as they affect the construction industry. . . . it would assure that these Davis-Bacon and apprenticeship regulations will not be permitted to take or remain in effect, in the absence of the proper approval in the course of legislative consideration." 137 Cong. Rec. H1528 (Mar. 7, 1989).

There appears to be nothing in these statements to indicate that the provision was intended to be permanent. There is no express statement that the provision was intended to be permanent, and the remarks are not inconsistent with position that the provision was a temporary measure designed to preserve the statue quo until further legislative consideration could be given to the issue in the authorizing process.

During the debate, some of the statements by opponents of the provision implied that it might be more than a merely temporary measure. It was stated that if the provision were allowed to stand, "it will cost us $600

million a year every year for the next umpteen years, as it has been costing us in the past," and that it "will save $600 million a year for the next however many years until we bring this up." 137 Cong. Rec. H1526 (Mar. 7, 1989) (Statement of Mr. Stenholm).

Other statements by opponents appeared to question the provisions relationship to the underlying appropriations bill. Members were asked "to strike out a portion of this supplemental appropriation that ought not to have been inserted in the first place. It has no business here . . . This ban on Davis-Bacon helpers is no emergency, has no place in an appropriation . . ." 137 Cong. Rec. H1527 (Mar. 7, 1989) (statement of Mr. Dickinson). In a letter urging disapproval of the provision, the Secretary of Labor opposed "legislating substantive labor policy in an appropriations bill. An appropriations ?bill? is not the appropriate vehicle for introducing significant reversals in established governmental policies." Letter from Lynn Martin, Secretary of Labor, to Joseph Moakley, Chairman, House Rules Committee Mar. 6, 1991, reprinted at 137 Cong. Rec. H1527-28 (Mar. 7, 1989) (Statement of Mr. Pursell).

While the statements of the opponents to the provision express some concern that its effect may be permanent, the general principle of statutory construction is that views of the opponents of a bill usually are discounted; a bill opponent's disagreement with the sponsors, floor manager, or the committee report ordinarily will not be given interpretational weight. *NLRB* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951); Costello, *Average Voting Members and Other "Benign Fictions,"* 1990 Duke Law Journal 39, 54 (1990).

The legislative history of the provision in question does not appear to be clear and unambiguous enough to overcome the statutory presumption that provisions in appro-

priations acts are not permanent legislation unless it is clearly provided otherwise.

In summary, the Comptroller General has ruled that a provision contained in an annual appropriations act may *not* be construed to be permanent legislation unless the language and the nature of the provision make it clear that such was the intent of the Congress. Both the language (words of futurity) and the nature of the provision (no direct relation to the object of the appropriations act) should indicate the intent by the Congress to make the provision permanent legislation, and that intent should be supported by the legislative history. 65 Comp. Gen. 352, 354 (1986). Moreover, a provision will be construed to be permanent if construing it as nonpermanent would strip it of meaning. 62 Comp. Gen. 54, 56 (1982).

Applying these principles to the provision in question, it appears on balance that the Comptroller General would be likely to find that the provision relating to Davis-Bacon and apprenticeships will expire at the end of the fiscal year ending September 30, 1991. This conclusion is based on (1) the absence of words of futurity and (2) the fact that the provision, which limits expenditures by the Labor Department, does not appear to be unrelated to the purpose of the Appropriations Act, which provides funds for that Department. Further, (3) the legislative history, read in accordance with conventional standards of statutory construction, is not inconsistent with this conclusion. Finally, (4) it is not necessary to construe the provision as a permanent law in order to give it legal effect.

VINCENT E. TREACY,
Legislative Attorney.

Mr. NATCHER. Mr. Speaker, I yield 4 minutes to the gentleman from Maryland [Mr. HOYER.].

(Mr. HOYER asked and was given permission to revise and extend his remarks.)

Mr. HOYER. Mr. Speaker, I thank the gentleman for yielding time to me.

Mr. Speaker, this is one of the most important pieces of legislation this body considers every year, the funding bill for the Departments of Labor, Health and Human Services, and Education. It is, as the gentleman from Kentucky [Mr. NATCHER] and the gentleman from Michigan [Mr. PURSELL]

APPENDIX V

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-1631

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *et al.*,

Plaintiffs,

v.

RAYMOND J. DONOVAN, *et al.*,

Defendants.

AFFIDAVIT OF JOHN T. DUNLOP

John T. Dunlop, being duly sworn, asserts as follows:

1. My name is John T. Dunlop. I reside in Belmont, Massachusetts. I am currently the Lamont University Professor at Harvard University. At Harvard University, I have served in the posts of Chairman of the Department of Economics and as the Dean of the Faculty of Arts and Sciences. My principal areas of specialization have been in the fields of economics, industrial relations and manpower. I have published numerous articles and books, including items on the construction industry.

2. In addition to my academic career, I have over the last forty years been deeply and continuously involved as a neutral umpire, arbitrator, impartial chairman or government official in the construction industry as well as in many other sectors.

3. The following is a list of assignments I have undertaken over the forty year period:

a. *National Wage Adjustment Board*, 1943-47 (World War II dispute settlement and wage stabilization machinery; public member of Tripartite National Wage Stabilization Board.)

b. *National Joint Board for Settlement of Jurisdictional Dispute*, 1948-57 (Chairman, private contractor-union national body to resolve jurisdictional disputes in construction.)

c. *Atomic Energy Labor Relations Panel*, 1948-53 (Member of 5-member governmental panel for atomic agency disputes; special responsibility for construction disputes.)

d. *Construction Industry Stabilization Commission*, 1951-53 (As a public member of the Tripartite Wage Stabilization Board in the Korean period, responsible for subsidiary tripartite agency in construction.)

e. *Construction Industry Joint Conference*, 1959-68 (Impartial chairman of private labor-management group to deal with a variety of construction industry problems.)

f. *Missile Site Labor Commission*, 1961-67 (Public member, chairman of the construction group of tripartite governmental panel to resolve disputes affecting missile sites.)

g. *Appeals Board, Jurisdictional Disputes*, 1965-68 (Chairman of private appeals body to resolve jurisdictional disputes.)

h. *Construction Industry Collective Bargaining Commission*, 1969-71 (Public member of governmental tripartite commission to deal with wide range of construction problems; Executive Order 11482.)

i. *Construction Industry Stabilization Committee*, 1971-74 (Chairman, 1971-73, Member, 1971-74, Tripartite Committee to Control Wages and Resolve Disputes; Executive Order 11588.)

j. *Umpire and Mediator, Nuclear Power Construction Stabilization Agreement*, 1977- (Collective agreement developed by major construction firms, electric utilities and building trades unions to apply to nuclear electric generating plants.)

k. *Umpire, Bricklayers and Mason Contractors Association*, 1982- National agreement to resolve collective bargaining disputes over the terms of local agreements.)

l. *Arbitrator on Jurisdictional Issues*, 1981- (Alaska oilfields construction agreements)

4. During the course of my duties as public member or chairman of the wage and price control agencies—the Tripartite Wage Adjustment Board (1943-1947), the Tripartite Construction Industry Stabilization Commission (1951-1953), and the Tripartite Construction Industry Stabilization Committee (1971-1974)—I became intimately familiar with the operations of the Davis-Bacon Act because the Secretaries of Labor agreed not to determine any rate to be prevailing that was in excess of the compensation approved by the wage control agency. Moreover, the Davis-Bacon staff serviced the wage control agency in two of these three periods. In the 1971-1974 era, further, as Director of the Cost of Living Council, I established a separate unit to handle construction cases not governed by collective bargaining agreements.

5. I also served as Secretary of Labor from 1975 to 1976 under President Ford, and gained additional familiarity with the administration of the Davis-Bacon Act. Many other public posts I have held, such as the Missile Sites Labor Commission, included working with the Davis-Bacon Act.

6. I have been involved in virtually every week of my career in a public or private capacity dealing with some problem, controversy, or dispute in and around the construction industry, and for at least ten of these years was responsible for wage controls, which brought regular contact with the administration of the Davis-Bacon Act.

7. I have examined the papers in this case including the complaint, motions, memorandum, etc., of both parties and the Final Regulations and Final Regulatory Impact Analysis.

8. I am making the following comments in my private capacity as a professor, experienced practitioner and interested citizen based upon my forty years experience in the construction industry.

9. First and foremost, I find the Department's conclusion that industry practices support its setting of a national uniform across branch, craft and locality of a two-helper to three-journeyman ratio, in addition to any apprentices, to be categorically wrong. The Department cites not credible evidence to support it, and for good reason. There is none. Moreover, there is no precedent in the administration of the Davis-Bacon Act to set ratios of categories of employees of any type—apprentices to journeymen, foremen to journeymen, or number of journeymen in a crew, or numbers on manned pieces of equipment. These are matters left to collective bargaining, or to management practice alone. The policy has been to determine wage and benefit rates for mechanics, apprentices and laborers and generally recognized helpers, not to set ratios of mechanics, apprentices, or laborers. There is a question of authority to change in this unprecedented and substantial way the policies of the past.

The fact is that helpers exist in some areas and in some trades, and not in others. Historically, helpers, where they exist, have been specifically defined by common consent and by custom and practice. Those definitions differ

from locality to locality and according to particular trades and particular branches of the construction industry. Their usage also varies according to project size, complexity, stage of the project, availability of craftsmen and numerous other factors.

Simply "*identifying*" the existence of a "helper" in a particular locality obviously cannot be relied upon to support any credible finding of either a general prevailing classification practice in a locality or a prevailing classification in a locality within a particular trade as is required by the Act. Nor conversely does the fact that helpers may constitute a prevailing classification in a particular trade in a particular community justify the conclusion that such classifications prevail in another town or prevail nationally.

10. An example will suffice to show the damage the helper regulation will create. New York, San Francisco and Chicago have classification practices covering mechanics and laborers which are more specialized than in many other smaller communities. There is simply no prevailing practice of using helpers as such in these areas which would justify a predetermination of a helper classification at all, much less setting a 2:3 ratio. There is no practice of "jack-of-all-trades" helpers much less multicraft helpers. Injecting these foreign classifications under these circumstances and providing contractors use them, a competitive advantage reflects not recognition of industry's practice or local practice, but has the consequence of undermining prevailing recognized local practices and wage rates.

11. The Department concludes there will be savings of $363 million by the creation of the helper classification to substitute for recognized prevailing classifications of mechanics and laborers. Its conclusion was reached by use of a simplistic formulation which is wanting from an economist's point of view and which I find to be unacceptable. Its methodology is based on a formula which fails

to take into account many of the real economic factors and forces which contribute to costs on a construction project. It appears that the Department takes the current wage rates and subtracts therefrom the savings to be gained by the cheaper rates when non-prevailing helpers replace prevailing laborers and mechanics. Based in turn upon another assumption that contractors will use the 2:3 ratio, or can economically use that ratio of helpers on all work on the project, the Department multiplies that wage differentiation by the number of helper substitutes and then arrives at some projected mathematical savings.

12. My views on the subject of whether Davis-Bacon increases costs are well known. I am attaching my testimony delivered in 1962 before the House Labor and Education Committee which sets forth my view that "the net effect of Davis-Bacon was neutral with respect to costs." (p. 25) I stated therein that achieving "cost savings" is not the statutory purpose but rather the purpose of the Act is stabilizing prevailing practices.

Focusing on the cost savings aspect of the helper issue, in the real world helpers are used in a system which requires more supervisors and uses less journeymen than the system that does not use helpers. Also, increased use of helpers may lead to lower productivity of helpers compared to journeymen. The speed of operations is also vital to costs. These and myriad other inquiries on different types of construction, crafts and stages of operation suggest that cost savings can only be arrived at after a comparative cost determination on the increased use of helpers, taking into account all relevant factors. Moreover, one needs to consider the effects in tight as well as lose job markets.

13. It would be possible to build a realistic economic data base that could start toward answering the cost savings inquiry. The best evidence of the cost of the two systems can be determined only if one starts by com-

paring costs of similar jobs in progress. There is simply no sound basis for gratuitously assuming that lower wage rates in the construction industry generally mean lower costs without looking at the total costs of the system used, and over a wide range of localities, types of construction and conditions of labor markets.

14. In my opinion, the helper and cross-craft helper regulation is a skill dilution program enabling employers to turn over journeymen's work to "jacks of all trades"—without a training component—who will have little chance of improving their economic or social position. Today, there are almost 200,000 apprentices in formal construction training programs acquiring technical skills which will enrich the present and future manpower resources of this country. Contractors will now have little economic incentive to support apprenticeship programs. Can this country over the long run afford this loss of its most vital private skill training program? Is the government then prepared to advance the costs of supporting such a system?

15. Further, I would disagree with the unsupported conclusion that providing financial incentives to introduce the helper classification throughout the entire construction industry will enhance work opportunities for minorities, youth or women. My experience teaches that formal training programs are essential to recruit and train minorities for the construction industry. Indeed, this is how progress has been made. Over the past decade, substantial progress has been made in recruiting minorities and now women to the ranks of the trades and also in placing them into *bona fide* craft apprentice programs. That system deserves the support of our government. Replacing such apprentices with helpers will turn back the clock on the advancement of minority and women apprentices.

Further, these regulations would purport to effectuate cost savings by replacing laborers with helpers at much

lower wage rates. The Laborer's International Union with over 500,000 members employed in the construction industry is composed of approximately 50 percent minorities, including Blacks, Hispanics, Portuguese and virtually every other minority. By organization and by local practice these laborers have established various classifications each with its set of tasks and assigned wage rates which Congress determined to recognize and to protect under the Davis-Bacon Act. By protections flowing from the Davis-Bacon Act in part, their lot has been improved dramatically and an otherwise casual labor system has been partially stabilized in many areas.

The regulations here introduce a so-called helper classification on all projects that will replace laborers and that provides for a substantially lower pay scales for the work which the various classification of laborers have hitherto performed at a higher prevailing rate in the locality. Contractors will for the first time be presented with a choice of either classifying workers hired to perform laborers' work as "Laborers" at a higher scale or as helpers at a lower scale. The contractor's economic incentive is obvious at a time of record unemployment where construction laborers have an unemployment rate of 40 percent. It is clear what will happen is that minority laborers will now find work in the construction industry drastically reduced, and that the concept of a "construction laborers" union with various classifications developed to improve the lot of persons on the bottom rung of the economic ladder will be undermined by administrative fiat.

16. For nearly half a century, the Davis-Bacon Act has protected locally prevailing classifications of laborers and mechanics on federal and federally assisted construction work. A contractor knew that if carpenter work was performed, the appropriate rate for the carpenter classification was to be paid—and that the contractor was not free to pay a laborers rate. Now, for the first

time, an employer will have the freedom to assign carpenter work, either to a person classified as a carpenter or to a worker classified as a helper at a lower scale. The employer will now be free to assign laborers' work to a laborer or to a person classified as a helper at a lower rate. Thus, within the 2:3 ratio each employer will be free to assign any work to either a mechanic or laborer on the one hand, or to a lower rated helper on the other. The helper classification on a two helper to three journeyman ratio makes unenforceable the payment of prevailing wages for mechanics and laborers since there is no administrable way to separate tasks assigned to journeymen, helpers, cross-craft helpers or laborers. There is almost no way to go to a job site and determine on a practical basis whether the regulations have been violated.

17. The new regulations prohibiting the use of metropolitan wage data on projects in a rural area are inappropriate and would, in some important cases, prohibit the Secretary of Labor from carrying out the statutory mandate of determining the prevailing rate. My general views on this subject were set forth in my testimony on July 25, 1962 before the Special Committee on Labor of the House Committee on Education and Labor considering the administration of the Davis-Bacon Act, which is attached.

In most instances, comparable projects exist in a rural area from which rates and classifications can be determined. The problem arises in those few situations where large, complex projects are to be constructed in a rural area, which in the past has not experienced any comparable project and where there are simply not enough qualified journeymen and laborers in the area to construct the project. Under such circumstances, the Secertary would still have a duty to predetermine a prevailing wage for the project even though there is no comparable work in the area. The issue then becomes "how

far away should one go to find a rate appropriate to [the particular project]." (p. 14).

In the past, the Secretary has looked to two central facts: (1) the size and type of the project, and (2) the source of supply from which mecahnics and laborers must be drawn. The federal government has built atomic plants, military installations and missile and space sites including Cape Kennedy. In rural areas, the federal government is considering a possible MX missile program where sites would be built in the West in rural areas. I have been involved in such projects in the past and I could describe scores of other similar, isolated, large projects.

In the past, rates were set not by restricting inquiry to other rural areas, but the closest area from which the labor force would come to build the project. Under these circumstances, to restrict the Secretary from taking a central factor into consideration in predetermining appropriate rates is highly impractical. No such project could be built with rural rates.

Further affiant sayeth not.

/s/ John T. Dunlop
JOHN T. DUNLOP

Subscribed and sworn to before me this 15th day of July, 1982.

/s/ [Illegible]
Notary Public

My commisison expires: May 31, 1987

APPENDIX W

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-1631 (HHG)

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Plaintiffs,

v.

RAYMOND J. DONOVAN, *et al.*,

Defendants.

AFFIDAVIT OF ROBERT A. GEORGINE

Washington, D.C.)
) ss:

I, ROBERT A. GEORGINE, being duly sworn, attest as follows:

1. I reside in Silver Spring, Maryland. I am President of the Building and Construction Trades Department, AFL-CIO, which is an unincorporated labor organization composed of fifteen affiliated national and international trade unions which are also plaintiffs in the above-entitled action.

2. These affiliates of the Building and Construction Trades Department represent over four million workers employed in construction jobs, many of which are subject to the Davis-Bacon and Related Acts.

3. The Davis-Bacon and Related Acts require that workers on federally-supported construction projects be

paid not less than the wage rate prevailing in their local area for work of a similar character. The basic purpose of this law is to ensure that government construction contracts are not won on the basis of substandard wages and working conditions.

4. The regulations issued by the Department of Labor on January 27, 1989, if approved by the court, would allow contractors on federally-financed and federally-assisted construction projects subject to Davis-Bacon prevailing wage standards to expand the use of semi-skilled and unskilled subjourneymen "helper" classifications at wages lower than those required to be paid to skilled journeymen classifications.

5. The regulations issued by the Department of Labor on May 28, 1982, which were enjoined by this Court, provided that a helper classification need only be "identifiable" in an area in order to be used on projects covered by Davis-Bacon prevailing wage requirements.

6. I understand that the United States Court of Appeals for the District of Columbia held that the Department of Labor's proposed "identifiable" standard would "operate to undermine the fundamental purpose of the [Davis-Bacon] Act: that wages on federal construction projects mirror those locally prevailing." For that reason, the Court of Appeals affirmed this Court's decision to enjoin the regulations which incorporated the "identifiable" standard.

7. Thus, the regulations issued by the Department of Labor on January 27, 1989, allow contractors to expand their use of helpers on projects covered by Davis-Bacon prevailing wage requirements if such use is found to be a prevailing practice on construction projects in the area.

8. This regulation, together with the regulation adopted on May 28, 1982, implementation of which has been deferred, that broadens the definition of a helper's duties

to allow lower paid but supervised helpers to undertake tasks which overlap with those of higher paid journeymen to be codified as 29 C.F.R. § 5.2(n)(4), will undermine the protection and benefits whivh workers employed on most federal and federally-financed construction projects have enjoined for almost three generations.

9. The new regulations will, like those currently enjoined by this Court, permit wholesale employment of workers in helper and other subjourneymen classifications at depressed wage rates even though such classifications may not actually represent the prevailing practice in the locality. As such, these regulations will permit contractors to avoid the prevailing wage requirement in the Davis-Bacon and Related Acts in a manner completely contrary to the language and purpose of the Act and the intent of Congress.

10. Specifically, the new regulation issued by the Department of Labor, which purports to define whether the use of a particular helper classification is "prevailing" in an area before it may be used on a project covered by a Davis-Bacon prevailing wage requirement, is really nothing more than another effort to apply an "identifiable" standard.

11. The new regulation, which is to be codified as 29 C.F.R. § 1.7(d), provides that the Department of Labor will recognize the use of a helper classification as "prevailing" if:

> a) More than 50 percent of the journeymen in a job classification are paid the same rate, then the practice followed by those contractors whose rates prevail for the journeymen is also deemed the prevailing practice for determining whether a helper classification prevails, or
>
> b) No majority journeyman rate exists and the prevailing wage is set by the Department of Labor's "weighted average rule" (29 C.F.R. § 1.2(a)(1)),

> then the practice which covers the majority of workers employed by contractors using a particular journeyman classification, that is the total number of workers in the classification employed by contractors using helpers, i.e., journeymen plus apprentices, trainees, and helpers, compared to the total number of workers in the classification employed by contractors not utilizing helpers, i.e., journeymen plus apprentices and trainees will be deemed the prevailing practice.

12. The Department of Labor described in its Notice of Proposed Rulemaking published on August 19, 1987, how this formula would create a situation where a *de minimus* use of helpers in a local construction industry would nevertheless be recognized as a prevailing area practice. The Notice of Proposed Rulemaking example, which appears at 52 Fed. Reg. 31367, provides that if 50 carpenter helpers are employed in conjunction with 100 journeymen carpenters on projects, compared to 100 journeymen carpenters employed on projects where no helpers are employed, carpenter helpers would be recognized as prevailing since the majority of workers in the craft—150 (100 journeymen plus 50 helpers) out of 250—are employed by contractors who use helpers. The result is that only 20 percent of the total workers in the classification are helpers, yet the use of helpers would be recognized as a prevailing area practice.

13. The Department of Labor's example of recognizing the *de minimus* use of helpers as a "prevailing" practice is more than hypothetical. The United Brotherhood of Carpenters and Joiners of America recently requested from the Department of Labor's Wage and Hour Division all of the information collected during a prevailing wage survey of Bexar County, Texas (San Antonio).

14. Much to the Carpenters' surprise, it was discovered that the Wage and Hour Division is already collecting

data concerning the use of helpers during the course of prevailing wage surveys.

15. The Carpenters proceeded to analyze the Wage and Hour Division's survey data for Bexar County, Texas and made the following findings:

a) Wage data from 93 different projects were included in the survey of wage rates paid to carpenters.

b) Carpentry contractors on more than one-half of those projects (54) did *not* use helpers even though only sixteen (16) of those contractors were party to collective bargaining agreements applicable to carpenters.

c) Thus, of the seventy-seven (77) projects performed by open shop contractors, thirty-eight (38) did not use helpers and thirty-nine (39) did.

d) There were 185 non-union carpenters who did not work with helpers compared to 155 non-union carpenters who did work with helpers.

e) In addition, the survey disclosed 43 carpenters who worked for contractors signatory to a collective bargaining agreement who also did not work with helpers.

f) Consequently, there was a total of 228 carpenters in the prevailing wage survey who did not work with helpers compared to 155 carpenters who did work with helpers.

g) Therefore, a majority of the carpenters in the survey did not work with helpers.

h) Nevertheless, pursuant to the Department of Labor's new regulation to be codified as 29 C.F.R. § 1.7(d), a helper classification would be recognized as a prevailing practice in Bexar County, Texas because the prevailing wage survey disclosed that 97 helpers were employed during the survey period.

i) Because the Department of Labor's regulation provides that helpers will be added together with those journeymen with whom they worked and compared to the number of journeymen who did not work with helpers, the result would be 252 carpenters and helpers versus 185 carpenters producing a "prevailing" practice of using carpenter helpers in Bexar County, Texas, when, in reality, such use is merely an "identifiable" practice.

j) The Bexar County prevailing wage survey data does not indicate how many non-journeymen, other than helpers, i.e., laborers, apprentices and trainees, etc., were employed; however, in order to overcome the combined numerical superiority of the carpenters and the helpers with whom they worked, those contractors which did not use helpers must employ at least 68 laborers, apprentices and/or trainees registered in programs approved by the Department of Labor's Bureau of Apprenticeship and Training (BAT) or a BAT-approved state agency.

k) The Department's wage survey does not, however, indicate whether such other semi-skilled classifications worked with journeymen carpenters. Even if it did, the Department's formula does not include laborers who perform semi-skilled "helper" duties.

16. This real example of the application of the Department of Labor's regulation clearly demonstrates that it does not insure that merely "identifiable" helper classifications will not be recognized as "prevailing" for Davis-Bacon wage determination purposes.

17. Moreover, the regulations issued by the Department of Labor on January 27, 1989, which include a numerical limitation on the use of helpers under which there can be no more than two helpers for every three journeymen, i.e., a maximum of forty percent of the total number of helpers and journeymen could be helpers

is inadequate to preserve and protect bona fide apprenticeship and training programs.

18. The basis upon which the forty percent ratio was selected by the Department of Labor as the numerical limit on the use of helpers on Davis-Bacon-covered projects is unclear. Nevertheless, I have reason to believe that the Department may have relied on a ratio of non-journeymen to journeymen which it found in the Intermountain Power Project Stabilization Agreement between Bechtel Power Corporation and several international and national unions as well as local unions affiliated with the Building and Construction Trades Department, AFL-CIO.

19. This collective bargaining agreement, a copy of which is attached hereto as Exhibit A, applies to the contractors and subcontractors engaged in construction of the Intermountain Power Project in Utah.

20. Article III, Section 5, of this agreement provides:

> It is agreed that the employer shall employ apprentices, trainees, helpers and sub-journeymen (hereinafter collectively referred to as non-journeymen) in the interest of hiring local, area and state residents and supporting the development and training of competent workers in the construction industry. Trainees, helpers and sub-journeymen classifications are not binding on unions who do not have such classifications. The Employer shall not be limited in employing the most efficient ratio of non-journeymen to journeymen up to a ratio of 40% non-journeymen to journeymen and shall utilize non-journeymen to their fullest capabilities. Specific provisions relating to non-journeymen classifications (except apprentices), including pay scales and progression increases, shall be determined by the Employer, however, this pay scale shall not be less than 50% of journeymen scale; or in accordance with existing recognized non-journeymen programs. Apprenticeship pay scales

shall be governed by the appropriate joint labor-management apprenticeship standards.

21. The numerical limitation in the Intermountain Power Project Stabilization Agreement applies to the number of sub-journeymen i.e., helpers, apprentices, and trainees, who may be employed on the project.

22. The numerical limit adopted by the Secretary, on the other hand, applies only to the ratio of helpers to journeymen. As a result, under the Department of Labor's numerical limitation, a contractor would be permitted to replace more than 50 percent of its workforce with non-journeymen inasmuch as at least forty percent of a contractor's workforce can be helpers, in addition to which the contractor may hire apprentices and/or trainees in accordance with ratios provided in applicable programs approved by the Labor Department's Bureau of Apprenticeship and Training (BAT).

23. Thus, the Department of Labor's numerical limitation on the use of helpers goes far beyond any numerical limitation negotiated by unions affiliated with the Building and Construction Trades Department.

24. Expanded recognition of helper classifications permitted by the January 27, 1989, regulations will have several other undesirable effects. It will substantially undermine the ability of the Department of Labor to carry out its congressional mandate under the National Apprenticeship Act "to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship . . ." The National Apprenticeship Act lacks enforcement authority. There are no penalties or sanctions provided in the Act for failure to comply with the requirements of the statute and its implementing regulations. The Department of Labor filled this void by promulgating regulations which provide that a mechanic

or laborer classified as an apprentice or trainee can only be paid less than the prevailing wage rate on a project covered by the Davis-Bacon Act, or a related statute, if he or she is registered with the Department's Bureau of Apprenticeship and Training (BAT) or a state agency recognized by BAT. This policy is not only consistent with the prevailing wage principle of the Davis-Bacon Act, but also creates an incentive to implement *bona fide* apprenticeship and trainee programs.

25. Expanded recognition of helper classifications in Davis-Bacon prevailing wage determinations will permit contractors to employ unskilled and semi-skilled workers without registering them in apprenticeship and training programs approved by BAT or an appropriate state agency. This will eliminate the primary incentive for employers to participate in the formal training programs necessary to insure that unskilled and semi-skilled workers eventually become qualified journeymen. Fewer contractors will bother to participate in formal training programs thereby causing their demise. In the long run, the construction industry, and the national as a whole, will suffer because the absence of *bona fide* apprenticeship and training programs will eventually result in a shortage of fully qualified construction workers capable of performing whatever tasks need to be done and supervising the work of others.

26. Thus, the unique relationship between the regulations implementing the Davis-Bacon Act and those implementing the National Apprenticeship Act will be substantially undermined if the proposed wholesale recognition of helper classifications is adopted. The possible short-term cost savings which might be realized from the wholesale recognition of helper classifications will be more than offset by the long-term shortage of fully qualified journeymen which is sure to occur if contractors need not comply with the National Apprenticeship Act in

order to employ less-skilled, lower paid workers on projects covered by the Davis-Bacon Act.

27. In my judgment, expanded recognition of helper classifications will severely undercut the existing apprenticeship and training programs which have served this industry so well. Entry of a construction worker into journeyman status frequently requires many years of training and experience. The level of productivity of a journeyman cannot equate with the level of productivity of a helper. Accordingly, the regulations and the regulatory analysis are faulty in making the assumption that helpers can be substituted on the job for skilled journeymen on a one-to-one basis. The questions of quality and safety in the workplace likewise have not been properly addressed in the Department of Labor's economic analysis.

28. The potential for harm to labor relations in this industry is enormous since these regulations may well interfere both with the collective bargaining process and the government's procurement process by once again placing a premium on a contractor's ability to obtain labor at the lowest possible cost.

Further affiant sayeth not.

/s/ Robert A. Georgine
ROBERT A. GEORGINE

Subscribed and sworn to before
me this 26th day of April, 1989.

/s/ [Illegible]
Notary Public

My Commission expires: 12-14-89

APPENDIX X

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-1631 (HHB)

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Plaintiffs,

v.

ELIZABETH H. DOLE, *et al.*,

Defendants.

AFFIDAVIT OF GEORGE A. MILLER

George A. Miller, being first duly sworn, attests as follows:

1. I reside at 423 Ridge Avenue, Clarendon Hills, Illinois 60514 and I am employed by the Mason Contractors Association of America, headquartered in 17W601 14th Street, Oakbrook Terrace, Illinois 60181.

2. The Mason Contractors Association of America is a trade association in the construction industry which represents masonry contractors in the United States and Canada.

3. Masonry contractors include those contractors performing brick, block, stone and all types of work involving masonry products and their substitutes. At the present time, we have between 850 and 900 contractor-members of the United States and Canada. Most of the large responsible masonry contractors belong to our organization.

4. I am the Chief Operations Officer and Executive Vice President of the Mason Contractors Association of America. I have served as the Chief Operating Officer of the organization at all times from 1950 to the present. As the administrator of the Association, I handle and carry out all of the directives of the Executive Board and the officers and operate the day-to-day programs of the Association. As part of my responsibilities, I am frequently present on construction sites. This has been my practice for most of the forty years that I have been the Chief Operating Officer of the Association.

5. My professional training is as an Architectural Engineer. I received a B.A. majoring in Mathematics from Augustown College, Rock Island, Illinois in 1944 and a B.S. in Architectural Engineering from Iowa State College, Ames, Iowa in 1947.

6. In addition to my particular experience with masonry contractors, I have been active in matters affecting the construction industry as a whole. In the 1970's, I was asked to serve on the Collective Bargaining Stabilization Committee by President Richard Nixon. The Committee consisted of five union representatives and five management representatives who reviewed all wage contracts in the construction industry. The Committee was chaired by Dr. John Dunlop of Harvard. Following that, I served on the Collective Bargaining Commission established by President Ford in 1975.

7. Our members perform masonry construction in all sectors of the construction market including that involving commercial structures; industrial structures; institutional buildings and residential construction work. Our work is performed on both private and public projects subject to the Davis-Bacon Act.

8. Mason contractors utilize in performing their work journeymen masons and also laborers—known as mason tenders. Masons are journeymen craftsmen who work

with brick, concrete masonry, stone, tile, terra cotta and other substitutes. Plastering is involved in many of our masonry trades as well.

9. I have reviewed the definition of a "helper" and every duty listed therein is performed by laborers classified as mason tenders. These are semi-skilled duties involving the use of tools and equipment. All of the laborers employed as mason tenders work under the supervision of a journeyman.

10. Without the assistance of this class of semi-skilled laborers, journeymen masons could not perform their duties efficiently, effectively, or at a level of acceptable quality. For example, if the mason tender does not mix the mortar correctly, the journeymen cannot lay the brick properly and an inferior quality product will result.

11. The term "mason tender" refers to a laborer who has a tending relationship to all of these different types of journeymen masons including the brick mason, the block mason, stone mason, tile mason and terrazzo mason.

12. The term "mason tender" first came in to use in the late 1960s. It is an evolution from the term "hod carrier," which was the term used by the Hod Carriers, Building and Common Laborers Union of North America, now known as the Laborers' International Union of North America.

13. A "hod" is a device that a person held on his shoulder and was used to carry the masonry materials or mortar in it. The "hod carrier" conveyed the materials to the craftsman. Conveyance of construction materials has evolved to more sophisticated types of equipment of conveyance. Therefore, a laborer is no longer referred to as a "hod carrier" because he no longer carries the hod. Rather, under modern construction terminology, the laborer is a tender in the masonry industry, or someone who "tends the mason".

14. In 1955, the Mason Contractors Association entered into a national collective bargaining agreement covering mason tenders—or hod carriers as they were then known—with the Laborers' International Union.

15. Contractors become bound to the current Agreement by executing a separate stipulation agreement. Most of our member contractors are signatory to this Agreement.

16. The scope of the mason tender's duties covered by the Agreement includes all of those functions normally related to tending the mason. The Agreement includes within the work of the mason tender "the tending of masons, unloading, mixing and all handling of all materials by any mode or method; unloading, erecting, moving, adjustment and dismantling of all scaffolds . . . starting, stopping, fueling, oiling, cleaning, operating and maintenance of all mixers, mortar pumps and other devices under the direction of the employer or its representative." Article V—International Agreement between the Mason Contractors Association of America, Inc. and the Laborers' International Union of North America.

17. Many of our contractors bid and are ultimately awarded projects which are federally-funded or assisted and are subject to the Davis-Bacon Act. Implementation of the new helper regulation will have an immediate impact on the willingness and ability of those contractors to bid public projects. If competing bidders are allowed to use lower paid and less trained helpers to perform the work currently performed by laborers classified as mason tenders, many of our contractors will simply not bid on these jobs because of the time and expense involved in putting together a bid when it will be unlikely that they could successfully compete. Other contractors will be unwilling to bid on public projects because they know that using lesser trained helpers will result in unsafe working conditions which will impact not only on laborers but on journeymen masons and others on the site as well. If

our contractors do not participate in the public sector of the construction market, it will mean an immediate lose of employment to untold numbers of laborers who are normally employed by our masonry contractors on public construction.

18. The purpose of the Davis-Bacon Act is to place all contractors on an equal competitive footing. If one group of contractors can assign work to a lower paid classification i.e., a helper, that is not prevailing, those contractors utilizing the higher paid but prevailing classification i.e. mason tenders, cannot bid the work competitively. The result of the helper regulation will be that the mason tender classification will disappear as contractors who employe them fail to win public contracts.

19. In certain labor markets where the pool of labor is limited, contractors—in order to maintain a competitive position—will seek to no longer execute stipulations binding them to the International Agreement which currentiy requires the use of laborers as mason tenders with higher wages and fringe benefits such as health, pension and training contributions. (It is not unusual for contractors to contribute $1.80 per hour for health, $1.70 for pension and $.10 for training in our sector of the market).

20. Such contractors may hire workers as lower paid helpers without fringe benefits who would have previously been hiring mason tenders. Thus, labor market conditions in particular localities may force the same worker today employed as a mason tender covered by a health plan or other benefits to accept employment as a lower paid helper without benefits such as health insurance or pension coverage.

21. We strongly believe that utilization of untrained helpers with no access to the training funds established through jointly-funded contributions will pose an immediate safety problem on the job. A lack of knowledge

by the mason tender about the materials create safety problems on the job for both himself, the journeyman mason as well as the entire job. Mason tends must be familiar with the weight of masonry materials. For example, a 100 pack of common brick weighs 450 to a maximum of 500 pounds, pending on the coring of the unit. (The coring are those holes in the unit to ensure that when the brick is put into the kilns it comes out true in dimensions. Large cores or small cores determine how much brick weighs.) If a laborer moving masonry materials deposited 2,000 pounds of material on a scaffold built for a brick mason, it is likely that the scaffold would have safety problems. If a tender picks up a pallet of block and puts it down in the middle of the scaffold plank and the scaffold collapses with workers on it, a safety problem resulting in serious injury or death may result.

22. Our Association strongly recommends that tenders take a course that we have developed so that they are familiar with the fundamentals of the materials and equipment that they are using and its capabilities so that it can be a safe operation for everybody on the jobsite. Our Technical Research Committee—now called the Material Handling Committee—has developed training materials used in jointly-sponsored Laborers Training Centers where it is used as a guide for training mason tenders. The Laborers—Associated General Contractors (AGC) conducts off-of-the-job programs for mason tenders who are trained formally at some 74 sites in the United States and Canada. Based upon the experience received by mason tenders working under the supervision of the journeymen and through their formal training programs, many thousands of mason tenders advance to journeyman status. We believe that diminished training of laborers as well as the replacement of trained laborers with untrained helpers will have an immediate impact on safety on public construction projects.

23. Finally, it is my experience that mason tenders are largely made up of minority group members. If this classification is eliminated or substantially reduced as I believe it will be by the helper regulation, it will have an immediate and severe impact upon minority employment in the mason tender classification.

Further affiant sayeth not.

/s/ George A. Miller
GEORGE A. MILLER

Subscribed and sworn to before me this 31 day of December 1990.

/s/ [Illegible]
Notary Public

My Commission Expires: 2/23/93

APPENDIX Y

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No 82-1631 (HHG)

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Plaintiffs,

v.

RAYMOND J. DONOVAN, *et al.*,

Defendants.

AFFIDAVIT OF JAMES M. WARREN

James M. Warren, being first duly sworn, attests as follows:

1. I reside at 82 Clove Hill Road, Glastonbury, Connecticut. I am the Director of the Laborers'—Associated General Contractors Education and Training Fund ("National Fund"), Route 97 and Murdock Road, Pomfret Center, Connecticut.

2. In 1975, I became Assistant Director to the National Fund and, in 1986, I became its Director. My duties include providing primary liaison between the National Fund and the 72 Laborers' local training funds and contractor organizations; development, presentation and monitoring of Laborers' training programs ranging from health and safety to basic construction plan reading; direct supervisory responsibility for all phases of the operation of the National Fund under the guidelines and policies set forth by the Board of Trustees, which is composed of six management and six union trustees.

3. The National Fund is a jointly trusteed, employee benefit fund established pursuant to Section 302(c)(6) of the National Labor Relations Act. It began in 1969 by agreement between the Laborers' International Union of North America, AFL-CIO ("LIUNA") and the Associated General Contractors of America, Inc. ("AGC") an employer association which represents thousands of construction contractors throughout the United States.

4. The National Fund is financed by contributions from 72 Laborers' local training funds throughout the United States and Canada. These funds are derived from contributions received from local funds and are based on a formula which relates to the local fund's revenue from the collectively bargained agreements. The contributions to the National Fund result from participation agreements between local training funds and the National Fund. Since 1969, the National Fund has expended more that 10 million dollars in direct development of laborers' training programs and in the actual training of construction laborers. Additional millions of dollars of negotiated training fund contributions have been expended by the 72 affiliated Laborers' local funds in direct training of construction laborers.

5. Virtually all of the funding for the National Fund and the 72 Laborers' local training funds are generated privately through collectively bargained training fund contributions, with the exception of early, seed federal funding and recent federal funding for the development of hazardous waste training programs.[1] If laborers' employment is reduced by the adoption of the final helper rule, the training efforts of the National Fund and the 72 affiliated local training funds will be severely harmed as a result of the significant reduction in contributions generated from collective bargaining agreements.

---

[1] In 1987, the National Fund received a 8.7 million dollar grant under the Superfund program to develop and implement a training program for hazardous and toxic waste removal.

The consequence for laborers will be to turn the clock back on the great strides which have taken place in the last twenty years in the training of construction laborers, many of whom have been minority and female workers who have successfully upgraded their skills, their wage rates, their job mobility and their overall economic earning power through Laborers' training programs.

6. The National Fund acts as an umbrella organization and as a "full-service" national training fund for the 72 affiliated local training funds, which are also organized as Taft-Hartley joint labor-management trusts. The management trustees of the National Fund are either owners or officers of major construction firms who are members of the AGC. The union trustees include International Officers from LIUNA, Regional LIUNA Officers, and Officers of Laborers' District Councils. Many are management and union trustees of local training funds as well.

7. The 72 local training funds are listed in Exhibit 1, which contains a map indicating the location of each fund. Many of these, including Alaska, Arizona and Northern California have established permanent training facilities where laborers are continuously in residence to attend training programs.[2]

---

[2] For example, the Pomfret Center site of the New England Laborers Training Trust Fund, which also serves as the headquarters for the National Fund lies on 113 acres and includes 65,000 square feet of buildings which house trainees in live-in facilities. In addition, there are dedicated hands-on training areas both out-of-doors and under-roof so training can take place regardless of weather conditions. For example, the Willard R. Wilkinson Laborers' Training Center of the Western Missouri and Kansas Training Fund is located on 150 acres near Kansas City, Missouri. This site has live-in facilities and is equipped to handle both indoor and out-door training.

The Kingston, Washington site of the Northwest Laborers' Training Trust Fund is located near Seattle, Washington. The site is a former federal installation, which was provided the Fund by the U.S. Department of Education. The facility includes dormitory space for trainees, administrative offices, a kitchen and classrooms

8. Thousands of laborers are trained annually nationwide by the local funds. For example, in 1987, 21,405 laborers were trained at 62 sites. Overall, the various local training funds providing skills and specialty training have offered training to nearly 20,000 members on average for each of the past five years. The five training fund facilities described above were responsible for training 5,449 people in 1987 alone.

9. Courses offered by the local funds range from one-day courses on "CPR" or traffic control to six to eight-week courses designed to expose the new laborer to equipment and work procedures in all areas of the laborers' jurisdiction. In addition, in recognition of the complex nature of asbestos abatement and hazardous and toxic waste clean-up, local funds provide a 32 hour course in asbestos abatement and other funds provide an 80 hour course in hazardous waste clean-up.

10. The history of laborers' training covers less than a quarter century. Unlike other construction unions, which have a long history of structured and standardized apprenticeship programs, laborers' training programs did not begin until the mid-1960's. Prior to that, laborers were given "quickie jobsite trailer variety" training, if

---

along with training areas for "hands-on" training, all situated on sixteen acres of property.

The Laborers' Training and Retraining Trust Fund for Southern California Facility is located south of Los Angeles. The buildings have 86,000 square feet under roof and provide complete live-in accommodations for one hundred persons. The outdoor training area covers ten acres.

The Louisiana Laborers'—AGC Training Fund facility is located in Livonia, Louisiana on seventy-seven acres of land. Today the facility includes a 30,000 square foot building containing administrative offices, kitchen and recreation areas, classrooms and a dormitory.

Each of the facilities described are designated to serve as regional training providers for the hazardous waste worker training program as well.

any. This primitive approach was sufficient when muscle and a strong back were the laborers' stock in trade. What a laborer needed to know—how to hold a shovel or heave a sledgehammer—could be learned quickly on the job.

11. However, this approach became inadequate as the technology and nature of laborers' work changed. With the onslaught of power tools, *e.g.*, jackhammers, pavement breakers, oxy-acetylene torches, power saws, compactors, etc., on-the-job training was inefficient and, more importantly, dangerous and costly. A recent arbitration describes these historical changes:

> In the old days [laborers] had a shovel and a wheelbarrow and maybe a light pick-up or a truck. You had a hand operated cement mixer that maybe had a little motor on it to run it. Really it was an awful lot of people with very little knowledge.
>
> As time has gone on . . . to stay abreast of what is going on and to stay cost effective, it has been necessary to use more and more specialized equipment like lasers and automatic cranes. You have now much more complicated cranes, concrete pumps. You can go on and on. You have to have people who know how to use these efficiently and safely in order to be competitive. . . .
>
> *In the Matter of the Arbitration between Union Trustees of the State of Michigan Laborers' District Council Training and Education Fund Management Trustees of the State of Michigan Laborers' District Council Training and Education Fund*, Case No. 54-30-1405-84 (unpublished decision).

12. In 1966, recognizing the inadequacy of job-site training, LIUNA began a pilot training program with the assistance of federal funds from the Manpower Development and Training Act. 42 U.S.C. § 2571, *et seq.* The first training program was designed to train laborers in eleven states and the District of Columbia, but

almost immediately the programs were extended to include eight more states.

From this modest beginning, LIUNA expanded these pilot training programs throughout the country. It confirmed LIUNA's position that a standardized, quality training program was necessary for the benefit of both laborers and contractors.

13. In 1969, LIUNA recommended to the AGC a joint training venture to serve as a national umbrella organization for the LIUNA pilot training programs. As a "national umbrella organization," a National Fund could assist already existing local training funds and promote the creation of new funds.

14. Thus, in 1969, the National Fund was established to create, nurture and provide resources to the local training funds. It was to provide training aids for trainees and instructors, curriculum assistance, including monitoring and evaluating local course offerings and instructors, safety films, and acting as a "clearinghouse" for the exchange of information.

15. In the 1970's, the National Fund's focus was primarily on skills training. To that end, it produced ten training films, an overview training film ("Training the Construction Laborer"), 22 filmstrips and training manuals, and instructor manuals.

16. In the 1980's, the National Fund's emphasis has remained centered on skills training with added interest on certain "specialty training" like Asbestos Abatement and Hazardous Waste Worker Training, along with health and safety and leadership courses. With these and other courses have come additional audio-visual aids, like "Safety Training for Supervisors", "A Primer on Human Relations", "An Awareness Course in Hazard Recognition", "A Course on Health & Safety (Asbestos)", "First Step to a New Environment (Hazardous Waste)", "A Foundation for Success", and "Making it Work", the latter two being films used in recruitment and orienta-

tion. It has also produced a Training Fund Operational Manual designed to provide local trustees and administrators information on personnel policies, management requirements and pension laws and regulations. These courses and films constitute the core curriculum of every local training program.

17. The typical local fund curriculum is varied, but normally at least encompasses the following course offerings:

Concrete Vibration
Orientation
Attitudes & Awareness
First Aid
O.S.H.A. Standards
Transit level
Laser Alignment
Pipelaying
Trenching & Shoring
Basic Plan Reading
Handsignals & Rigging
Rough Terrain Forklift
Scaffold Building
Mason Tending
Carpenter Tending
Line Foreman Safety Course
Compaction
Concrete Placement
Air Compressor
Air Tool Operation
Oxy-Acetylene Cutting
Oxy-Gun
Sandblasting
Chainsaw Bucking & Felling
Small Gas Engines
Concrete Saws
Asphalt Raking
Air Track Drill Operation
Traffic Control and Signalling
Drilling and Blasting
Productivity Analysis
Basic Line and Grade Checking
Asebstos Abatement Techniques

18. In addition to the specific courses on mason tending and carpenter tending listed above, other courses teach skills integral to a laborers' roles as a helper or tender to skilled journeymen such as *Handsignals and Rigging*, *Rough Terrain Forklift* and *Scaffold Building*. These courses typically are offered several times a year by a training fund. They may be as long as six-weeks, full time sessions, or shorter one to three-week programs. Many of the local funds have very extensive training centers and full service residential facilities as described above. The courses involve classroom work and intensive hands-on training with a special emphasis placed on safety.

19. The classroom instruction consists of films, slide presentations, lecturing and reading, and preliminary introduction to tools and equipment. Initially, the trainees are introduced to construction tools and machinery through slides or film cartridges. Later, they are given manuals which correspond to the cartridges. These include:

The 90 Pound Pavement Breaker
Compressed Air Tool Safety
Small Gas Engines
Concrete Vibration
Portable All Purpose Saws
Concrete Saws
Sandblasting
Soils and Compaction
Chipping Guns and Grinders
Oxy-Acetylene Cutting
Clearing Tools
Chainsaw Sharpening
Felling and Bucking
Mechanics of Lifting, Prying and Moving Objects
Hand Lowered Shoring
Machine Lowered Shoring
Safety Around Explosives
The Jackhammer
Air Track Drilling
Mason Tending and Fork Lift Safety
Placing and Raking Asphalt
Safe Chain Saw Operation and Maintenance

The trainees keep the manuals so as to provide them an opportunity to review their training instructions after they leave the training programs.

20. The films that can be shown in the classroom are:

Concrete Vibration
Excavation
Compaction
Cut, Burn, and Clean Safely

Trenching and Shoring
Clearing Timber on Construction
Drilling and Blasting
Working at Heights safely
Basic Methods Used in the Transfer of Grade Points
The Laborer Foreman
Training the Construction Laborers
Safety Training for Supervisors
A Primer on Human Relations
An Awareness Program in Hazard Recognition
A Course on Health and Safety (Asbestos)
A Foundation for Success (Overview)
First Step to a New Environment (Hazardous Waste)
Making it Work (Overview)

21. Hands-on training is emphasized along with classroom instruction. This ensures proper, safe operation of the equipment and tools.

22. In the late 1970's, although skills training remained its major focus, the National Fund recognized that it could better serve laborers and contractors by developing courses that offered personal growth to the individual laborers through training in basic educational skills and construction principles and increased productivity for the contractor. To address these needs, as well as the need for an improved safety program, the National Fund began developing a series of such broad based courses for laborers with the capability and experience to benefit from them. These programs spring from LIUNA's and contractors' recognition that they are not adversaries in the areas of safety and productivity.

23. The first program was the "Line Foreman Safety Course" (LFSC). It was completed in July 1979 and cost approximately $1,115,000 to develop and deliver. The Occupational Safety and Health Administration (OSHA) contributed an additional approximately $350,000 under its New Directions Grant Program for the purpose of testing and delivering the LFSC Program to local funds.

Although designated for "line foremen",[3] the course was designed for and presented to laborers regardless of whether they actually performed foremen duties.

24. The second program was the "Concrete Technology Program," which became available in 1980. Developed at the National Fund Training Center, the basic text for the course is Kaiser's Concrete Topics. This course was a recognition that concrete work is a very specialized activity with many noncutting skills and that laborers engaged in concrete work must understand the totality of the process in order to effectively do their particular jobs. The developmental costs of this program were approximately $347,000.

25. The third program was the leadership training "Productivity Analysis Course," which was introduced in 1983. It was pilot tested in 1982 at the National Fund facility with training directors and instructors. This unique program is, in practice, a training program in leadership and communication skills. It cost the National Fund $65,000 to deliver and has an estimated market replication value of $255,000.

In August 1984, the National Fund developed the "Basic Plan Reading Course". It is a self-paced programmed approach to construction plan reading. The course materials include a plan book, which contains introductory information; symbols and abbreviations; and 63 plan sheets from construction projects. The course includes 14 question and answer booklets designed to lead the trainees through every detail of a plan sheet. Its minimum market value is estimated at $275,000, exclusive of delivery costs estimated at $120,000 to date.

26. In 1985, the National Fund developed an additional "Foremen Program" course entitled "Basic Line and Grade Course for Construction Laborers."

---

[3] A line foreman is usually the senior laborer on the job and is actually a working foreman.

27. Beyond these programs, the National Fund has developed and funded a "Scholarships for Laborers" program. The Scholarship program enables local funds to offer specialty training to its members without establishing a costly in-house training capability. It permits any local fund to send its trainees to specialized local training funds throughout the country. This scholarship program encourages the development of special expertise and the utilization of local training sites as regional or national training sites. Some of the courses offered through the Scholarship Program are the air track drilling and explosives course at the Northwest (Washington) and Indiana training sites. Other courses offered include diver tender, scuba diving for construction work performed under water, waterblasting and asbestos supervisor training.

28. An example of another specialized training program is the New England Training Fund's development of the "Asbestos Abatement Course" This course combines classroom lecture and discussion with "hands-on" practice in a simulated asbestos removal operation. Since 1981, when it was first offered by the New England Fund, over 50 local funds have sent their instructors to New England to learn to teach the course. Moreover, the course has been certified under the Asbestos Hazardous Energy Response ("AHERA") and by several states. A recently revised version of this course has been presented to the Environmental Protection Agency as an example of a model asbestos abatement training program for workers, and has received EPA certification under AHERA.

29. In September 1987, the National Institute of Environmental Health Sciences (NIEHS) of the National Institute of Health awarded Laborers-AGC a $8.7 million five year grant to develop a Superfund Hazardous Waste Worker Health and Training Program. In awarding the grant, NIEHS described the history and the institutional commitment of the National Fund to long-term laborers' training:

This is a solid program that meets the criteria outlined. It has good technical backup from organizations that have a history of working well together. The National Fund is an umbrella organization for some 62 local funds.

There is a clear history of training in the area of health and safety that is impressive from this consortium. There is a real commitment and ability to continue this training after the life of the grant. Its strongest points are that it is based in worker's unions and is committed to continuing hazardous material handling education after the life of the grant.

The hands-on segment promises to be the strongest point of this program. The potential to develop waste site simulations is impressive. The fact that this will occur around the nation and without direct support from the grant is a strong indication of institutional commitment.

This proposal targets members of the Laborer's Union primarily. Many of its members are involved in the clean-up and maintenance of sites. . . .

The sponsoring organization has an excellent working relationship with members of the Laborers' Union and important contractors. The training would take place at the same sites as basic instruction in the tools of the trade, although a clear distinction will be maintained, and only already skilled workers will be allowed to participate in this program.

The potential size of the population is adequate, and a national network of locations are already identified and have affiliations to the National fund. The membership of the Laborer's International is some 500,000 in the United States and Canada.

The proposal comes from a union that is intimately familiar with the day-to-day activities of workers on

these sites. There are clearly separate programs run by the Fund to train workers in the basics of their trade. It is the intent of this proposal to train only skilled workers in health and safety aspects of their job.

Six training sites are proposed. The facilities are used for training of members in a variety of areas. The bulk of the training normally done is hands-on training. This is the strongest part of the proposal. There are excellent plans to destign mock sites and have them constructed by students in other classes run by the fund. NIEHS Grant Letter. September 4, 1987. See Ex. 22.

30. Attached are examples of training materials which are representative of the curricula of the 72 Laborers' local training funds around the country. These training curricula demonstrate that laborers are trained as helpers and tenders to skilled journeymen and that the duties learned by laborers' helpers and tenders are identical to those enumerated in the helper definition to assist the journeyman including (1) preparing, carrying and furnishing materials, tools, equipment and supplies; (2) maintaing them in order; (3) cleaning and preparing work areas; (4) lifting, positioning and holding materials or tools; (5) using the tools of the trade; and (6) other related, semi-skilled tasks as directed by the journeyman. Exhibits 2-21.

31. The Oregon-Southwest Washington Laborers' Joint Apprenticeship Training Council has received approval from the State of Oregon for a 2000 hour on-the-job "Construction Laborer" apprenticeship program covering classifications which include Carpenter Tender, Driller Helper, Plasterers (Hod Carriers) Brick mason (Hod Carrier). Ex. 7.

32. The Philadelphia Training Fund conducts training programs on "Craftsman Helping Tending" for laborers,

The curriculum demonstrates that the laborer "Craftsmen Helper/Tender" is trained to perform the very duties contemplated by the helper definition. For example, the program utilizes the filmstrips on "Mason Tending and Forklift Safety" and "The Mechanics of Lifting, Prying and Moving Objects". The course covers the tools (level, hammer, cheater, shovel, pliers) needed to erect scaffold for journeymen to work on; hand and machine mixing for mortar to be used by bricklayer journeymen; movement of bricks and block; placement of brick and block; hand crane signals; stacking materials on the scaffold; "staying ahead of the mason"; clearing and washing down the mixer; covering and storing materials, clean[ing] and oil[ing] hand tools, collect[ing] and stor[ing] tools, "estimating materials needed by craftsman"; "receiving, handling, stacking and storing materials." The "trowel trades" tender has similar duties which include "position block *as directed* for easy handling by mason" "place mortar pans and studs *as directed* on scaffold"; transport and distribute mixed mortar; "show trainees proper methods for cleaning, maintenance and storage of tools, equipment and materials." Ex. 4, Ex. 5, and Ex. 6. (emphasis in original).

33. The Greenfield Laborers' and Construction Industries Institute, a construction laborers' training facility owned and operated by the Laborers' Joint Training Fund of Washington, D.C. conducts training for mason tenders and carpenter tenders. Ex. 15.

34. The Michigan Laborers' Training Center sponsored by LIUNA and the Associated General Contractor of Detroit; Associated Underground Contractors and Michigan Road Builders Association has trained laborers since 1974 in a range of skills including "mason tending." Ex. 19.

35. The Laborers' District Council of Virginia has a permanent training facility at Toans, Virginia where courses are offered in "carpenter tendering" and "mason tending." Ex. 14.

36. The Ohio Laborers Training and Upgrading Trust Fund operates a permanent facility at the Ohio Laborers Training Center in Howard, Ohio which includes courses such as "Ropes and Strip, Mason Tending". Ex. 16.

37. The Tri-Cities Laborers' Training facility located at Schenectady, New York, states that "advancements in modern construction techniques and the use of specialized tools and equipment have dramatically changed the skill and responsibilities required of a qualified construction laborer. It insures greater job security and higher earning potential; the construction laborer must become more diversified and increase his knowledge of a variety of skills, tools and techniques." Ex. 11. The New York course includes "mason tendering" and "carpenter's helper" as part of the 40 hour basic laborer course. Ex. 11.

38. The New England Laborers' Training Trust Fund encompasses over 50 local unions and contractor associations in Massachusetts, Connecticut Rhode Island, Maine, New Hampshire and Vermont. It has permanent training facilities in Hopkinton, Massachusetts; Pomfret, Connecticut, and Providence, Rhode Island. Its curriculum includes carpenter tendering, cement finisher tendering and mason tendering and a host of other skills involved in helping other crafts. Ex. 8.

39. The Illinois Laborers' and Contractors Training Institutes offers a nine week course at its Center in Brown County, Illinois, where it teaches Bricklayer Tender, Carpenter Tender, Cement Mason Tender, Granite Tender, Hod Carrier, Pipelayer Tender and Plaster Tender. Ex. 9.

40. The foregoing curricula and materials are attached as well as curricula from other laborers' training programs which demonstrate that laborers' are trained in the range of helping and tending skills necessary to assist the skilled journeyman. Exhibits 2-21.

41. The National Fund has produced a number of films which demonstrate the nature of laborers' training and the duties they perform: (1) "Making It Work" (1989); (2) "Hazardous Waste Orientation and Recruitment" (1988); (3) "Training the Construction Laborers" and (4) "A Foundation For Success" (1987). Attached is "Making It Work," the most recently produced Laborers'-AGC film. Ex. 23.

Further affiant sayeth not.

/s/ James M. Warren
JAMES M. WARREN

Subscribed and sworn to before me on this 26th day of April, 1989.

/s/ Ann Carol Jacobson
Notary Public

My commission expires: 1991

APPENDIX Z

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-1631 (HHG)

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Plaintiffs,

v.

RAYMOND J. DONOVAN, *et al.*,

Defendants.

AFFIDAVIT OF CARL E. BOOKER

Carl E. Booker, being first duly sworn, attests as follows:

1. I reside at 15893 Northgate Drive, Dumfries, Virginia. I am Director of Jurisdiction of the Laborers' International Union of North America, AFL-CIO, 905 16th Street, N.W. Washington, D.C. 20006.

2. The Laborers' International Union of North America, AFL-CIO, ("LIUNA") is composed of 713 Local Unions; 64 District Councils and 491,069 members, who are employed on public and private construction projects throughout the United States and Canada. Laborers comprise 17.1% of actual employment in the construction workforce. *Annual Construction Industry Report* (U.S. DOL 1981).

3. I have been Director of Jurisdiction for LIUNA since 1982. I served as Assistant Director of Jurisdiction from 1979 to 1982. In that capacity I am directly re-

sponsible to the General President and serve as the custodian of all files pertaining to the jurisdiction of work for construction laborers represented by LIUNA. I represent LIUNA at jurisdictional meetings and proceedings involving other International Unions, contractors, government agencies and any other interested parties regarding the proper work of construction laborers. I am responsible for preparing and presenting LIUNA's position at forums adjudicating jurisdictional disputes including the National Labor Relations Board, courts and impartial dispute resolution proceedings.

4. In my capacity as Jurisdiction Director, I have become familiar with the work practices of laborers and with laborers' collective bargaining agreements negotiated by 713 Local Unions and 64 District Councils throughout the United States and Canada.

5. I have reviewed the Department of Labor's ("DOL") final helper rule, most particularly as it purports to describe and draw conclusions concerning the role of laborers in the construction industry, including conclusions about the skill level of laborers; job content of laborers; pay scales of laborers relative to "helpers"; and the supervisory relationship of laborers to craft journeymen. The conclusions drawn by DOL are without any basis in construction industry practice as it exists today.

6. The tasks associated with laborers were set forth in great detail in the 1903 Charter of the Laborers' International Union, then known as the International Hod Carriers, Building and Common Laborers' Union of America. It stated the work of laborers to be:

> Wrecking of buildings, excavation of buildings, digging of trenches, piers and foundations, holes, digging, lagging, sheeting of said foundations, holes, and caisson work, concrete for buildings, whether foundations, floors or any others, whether done by

> hand or any other process, tending to masons, mixing and handling all materials used by masons (except stone setters), building of scaffolding for mason's plasters, building of centers for fire proofing purposes, tending to carpenters, tending to and mixing of all materials for plastering, whether done by hand or any other process, clearing of debris from buildings, scoring, underpinning and raising of old building, drying of plastering, when done by salamander heat, handling of derision stones.[1]

As the modern construction industry evolved, laborers continued to function as the helping and tending craft to skilled journeymen. The Manual of Jurisdiction of the Laborers' International Union of North America (October, 1961, as amended) sets forth the tasks falling within the laborers' craft as "tending masons, plasterers, carpenters and other building and construction crafts." The activities listed under tending include "preparation of materials and the handling and conveying of materials to be used by mechanics of other crafts; unloading, handling and distributing of all materials, fixtures, furnishings and appliances; cleaning and clearing of all debris; aging and curing of concrete and other materials, and general clean-up.

7. The term "Tenders" is synonymous and interchangeable with the term "helper" in the construction industry. For example, a mason tender is identical to a bricklayer's helper. The usage of the terms is dependent upon the custom of the construction industry in a particular locality, but the core meaning of the classification is that the worker assists or "tends" to a skilled craft under the direction and supervision of the journeyman. Thus, the "mason tender" "helps" the journeyman bricklayer. Consistent herewith, LIUNA's General Executive Board voted in

---

[1] April 28, 1903 Charter issued to the International Hod Carriers, Building and Common Laborers' Union of America by the American Federation of Labor.

February, 1943 to substitute the phrase "tenders to carpenters" for "carpenter helper" in all subsequent collective bargaining agreements.

8. Contrary to the conclusions drawn by DOL, attached are materials which establish that laborers are, in fact, semi-skilled workers who perform the duties specified in the helper definition; who directly assist and work under the direction of skilled journeymen; whose wage rates are, more often than not, above helper wage rates; and who are currently recognized in both state and federal wage determinations as semi-skilled "helpers" or "tenders" on construction projects throughout the United States.

9. Based upon my experience with thousands of laborers' collective bargaining agreements throughout the United States and Canada, it is almost universal for laborers' agreements to include classifications of helpers or tenders to skilled journeymen who directly assist and work under the supervision of the journeyman, or to otherwise include a semi-skilled classification of laborers, whose duties fall within those duties enumerated in DOL's definition of a "helper." Attached are representative laborers' collective bargaining agreements demonstrating this practice. Exhibit 7.

10. Attached is "Davis Bacon Wage Determinations Where Laborers Are Identified As Helpers, Tenders, or Otherwise Assist Craft Journeyman," Exhibit 1, which demonstrates that DOL's *Davis-Bacon General Wage Determinations* include in approximately 48 states laborer classifications which are tenders and helpers to skilled journeymen. These classifications are based upon surveys and laborers' collective bargaining agreements which the International Union, its Local Unions and District Councils routinely provide to DOL as part of DOL's survey process. Thus, while it is impractical and burdensome to attach all laborers' collective agreements herein, DOL itself has within its possession laborers' collective bargain-

ing agreements which demonstrate the job content of laborers' helper and tender classifications which form the basis of its wage determinations.

11. Exhibit 1 was created by extracting every laborers' classification of a helper or tender to a skilled journeyman listed in the Department of Labor's *General Davis-Bacon Wage Determinations*. Exhibit 1 is based upon the 1988 Davis-Bacon *General Wage Determinations*. It has not been submitted with this affidavit in order not to overburden the court with paper.[2] Rather, Exhibit 1 presents in chart form a listing of the pertinent laborers' helper or tender classifications with reference to the page upon which each classification can be found in the DOL Davis-Bacon *General Wage Determinations*.

Exhibit 1 shows DOL recognizes laborers as helpers or tenders in numerous wage determinations within forty-eight states, three U.S. Trust Territories and the District of Columbia. The Davis-Bacon *General Wage Determinations* describes the basis of these determinations as follows:

> "Each wage determination sets forth prevailing rates for laborers and mechanics engaged in various construction occupations in the majority of counties across the Nation." (*General Wage Determinations Issued Under the Davis-Bacon and Related Acts*, Vol. I, ESA Regions 1-4, page i.) Also, each wage determination is . . . based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources . . . which are determined to be *prevailing* for the *described classes of laborers* and mechanics em-

[2] The complete four volumes of DOL *General Davis-Bacon Wage Determination Issued Under the Davis-Bacon and Related Acts, U.S. Department of Labor, employment Standards Administration, Wage and Hour Division*, January 2, 1987 ("*General Wage Determinations*") is Ad. Rec. 000277-000749.

ployed on construction projects of similar character and in the localities specified therein." (*Ibid* pages xiii and xvii) (emphasis added).[3]

12. "State Government Sources When Laborers Are Recognized as Helpers, Tenders or Otherwise Assist Journeymen," Exhibit 2, provides a similar listing of laborers classified as helpers or tenders from various state government sources. This table is less comprehensive than Exhibit 1 in that it does not include every state government nor all the documents of this type which might be produced by any one state. Rather, this listing was compiled from various surveys and prevailing rate schedules from states which made such documents available when the tables were prepared. This table does, however, corroborate the conclusions drawn from Exhibit 1. By state government standards, laborers are frequently identified as tenders or helpers of journeyman classifications. Ex. 2

13. "General Davis-Bacon Wage Determinations Where Laborers Are Categorized As Semi-Skilled or Skilled," Exhibit 5, and "Examples of Laborer Classifications Listed By Various Gradation, Responsibilities or Skill Levels: State Government Sources," Exhibit 6, show that DOL and states have determined that laborers' encompass a semi-skilled classification or that gradations of skill levels from unskilled, semi-skilled to skilled are found within laborers' classifications. Exhibit 5 lists Davis-Bacon wage determinations where laborers are specifically identified as being semi-skilled or skilled. The basic hourly rate (exclusive of fringe benefit contributions) are also in-

[3] Exhibit 1 was compiled from a comprehensive review of all federal Davis-Bacon wage determinations. The table lists the wage determination number and construction type of each wage determination where a helper or tender occupation is classified as a laborer. In many instances, a tender or helper job title is repeated within one wage determination. When the title is listed in more than one zone or class of laborer, no attempt is made, however, to note these repetitions within the same wage determination. Ex. 1.

cluded in the table to reflect the range of value associated with the variety of laborer jobs duties, responsibilities and skill levels. This listing excludes the numerous wage determinations where laborers are grouped into classes which clearly command different skill levels, as indicated by the corresponding job titles, equipment operated and/or pay level. Only wage determinations which specifically identify a laborer as skilled or semi-skilled are included. In many instances, the number of job titles and pay ranges within groups of laborers was too numerous to include in this table. In those cases, the table refers to the appropriate page number within the wage determination for more detail. Exhibit 5.

14. State government agencies also recognize the variety of duties and skill levels of construction laborers as Exhibit 6 demonstrates. In sixteen prevailing wage schedules and two statewide surveys provided by state government agencies, construction laborers are identified by a variety of job titles, classes and groups. While, in some of these schedules, laborers are not specifically categorized by skill level, the job titles, responsibilities, equipment and tools operated and pay levels clearly show that, by state government standards, construction laborers perform at semi-skilled and skilled levels of work. Exhibit 6.

The conclusions drawn by DOL concerning the skill and pay levels of laborers and their job content are, therefore, directly contradicted by Exhibit 5 and Exhibit 6.

15. "Comparison of Total Hourly Wage Rates Between Laborers Classifications and Helpers Classification in Davis-Bacon *General-Wage Determination*, Exhibit 3, compares wages determined by DOL in Davis-Bacon wage determinations for construction laborers and helpers where both classifications are included in the same wage determination.[4] Total hourly wage rates, including fringe

[4] Exhibit 3 excludes those wage determinations which cover laborers but not helpers and excludes those which cover helpers but not laborers.

benefit contributions, are compared. And additional benefit contributions, are compared. Any additional benefit contributions not included in the total hourly rate are reported by means of a footnote.

In each instance where a helper classification is included within a wage determination [5], the helper rate is less than the rate set for all or some of the laborer classifications within the same wage determination 416 out of 757 times or 55% of the time. In one fourth of the 333 instances where no laborer rate is greater than that for the surveyed helper position, the helper rate is that of an elevator constructor helper—a classification which many in the construction field consider to be the equivalent of an apprentice. In eight instances the laborer rate was at least equal to that of the helper.[6] Exhibit 3.

Because Davis-Bacon wage determinations are based on the wage and benefit practices of the surveyed locality. Exhibit 3 indicates that laborers commonly are paid at wage rates which exceed those paid to helpers.

16. "Comparison of Wage Rates Between Laborer Classifications And Helper Classifications: State Sources," Exhibit 4, also compares the wage rates of helpers and laborers reported in a variety of publications prepared by state government agencies. Although less comprehensive in scope, it too shows that construction laborers are paid at a higher or similar rate to helpers. Exhibit 4.

---

[5] Each helper counts as one occurrence thus, three helpers within one wage determination would be counted as three occurrences.

[6] It should be noted that in many instances the prevailing rates for a laborer and helper classifications vary according to defined areas particular to that specific classification. When possible, direct comparisons are made between helper and laborer classifications within the same area or zone. In some cases, however, it was not possible to compare the prevailing rates of helpers and laborers within some of these narrowly defined geographic areas.

17. Under the collective bargaining agreements of the vast majority of laborers' local unions and district councils, it is the practice for contractors to request the classification of laborers needed for a job and for the local union to refer out to the job the number and type of laborers requested. Because this is a local function, the International Union of LIUNA does not maintain referral or dispatch records.

However, in order to demonstrate that laborers' local unions refer out laborers to contractors who employ them as helpers and tenders to the skilled crafts, attached are tabulations of referral slips for several local unions. Exhibit 8.[7]

Further affiant sayeth not.

/s/ Carl E. Booker
CARL E. BOOKER

Subscribed and sworn to before me on this 27th day of April, 1989.

/s/ [Illegible]
Notary Public

My commission expires: Sept. 30, 1992

---

[7] The referral slips which form the basis of the tables in Exhibit 8 number in the thousands (approximately 11,090) because there is a single "slip" for each worker referred. In order not to overburden the court, the individual slips which form the basis of Exhibit 8 are not attached. Rather, an example of referral slips are attached to the table for each local union. Ex. 8.

APPENDIX AA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-1631 (HHG)

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Plaintiffs,

v.

ELIZABETH H. DOLE, *et al.*,

Defenadnts.

AFFIDAVIT OF JOHN T. DUNLOP

John T. Dunlop, being duly sworn, attests as follows:

1. My name is John T. Dunlop. I resident in Belmont, Massachusetts. I am currently the Lamont University Professor Emeritus at Harvard University and Acting Director of the Business and Government Center of the John F. Kennedy School of Government. At Harvard University, I have served in the posts of Chairman of the Department of Economics and Dean of the Faculty of Arts and Sciences. My principal areas of specialization have been in the fields of economics, industrial relations and manpower, in which I have published numerous articles and books, including those on the construction industry.

2. In addition to my academic career, I have served as a neutral umpire, arbitrator, impartial chairman or government official in the construction industry as well as in many other sectors. My assignments have included:

National Wage Adjustment Board (1943-47—World War II dispute settlement and wage stabilization machinery in construction); *National Joint Board for Settlement of Jurisdictional Disputes* (1948-57); *Atomic Energy Labor Relations Panel* (1948-53—Member of five-member governmental panel for atomic agency disputes; special responsibility for construction disputes.); *Construction Industry Stabilization Commission* (1951-53—Public member of the Tripartite Wage Stabilization Board in the Korean period; responsible for subsidiary tripartite agency in construction); *Construction Industry Joint Conference* (1959-68—Impartial chairman of private labor-management group to deal with a variety of construction industry problems); *Missile Site Labor Commission* (1961-67—Public member, chairman of the construction group of tripartite governmental panel to resolve disputes affecting missile sites); *Appeals Board, Jurisdictional Disputes* (1965-68—Chairman of private appeals body to resolve jurisdictional disputes); *Construction Industry Collective Bargaining Commission* (1969-71—Public member of governmental tripartite commission to deal with a wide range of construction problems); *Construction Industry Stabilization Committee* (1971-74—Chairman, 1971-73, Member, 1971-74, Tripartite Committee to Control Wages and Resolve Disputes); *Umpire and Mediator, Nuclear Power Construction Stabilization Agreement* (1977—Collective agreement developed by major construction firms, electric utilities and building trades unions regarding nuclear electric generation plants); *Umpire, Bricklayers and Mason Contractors Association* (1982—National agreement to resolve disputes over the terms of local collective bargaining agreements); *Arbitrator on Jurisdictional Issues* (1973-80—Alaska oil fields construction agreements); *Arbitrator on Jurisdictional Issues* (1985—Commonwealth Edison Co., Power House Maintenance—Modification Agreement By Contract); *Arbitrator on Jurisdictional Issues* (1989—Boston Harbor Project Labor Agreement)

3. I also served as Secretary of Labor from 1975 to 1976 under President Ford.

4. In almost all aspects of my career, whether in a public or private capacity, I have dealt with some problem, controversy, or dispute in and around the construction industry. For at least ten of these years, I was responsible for wage controls which brought me into regular contact with the impact of the Davis-Bacon Act on the construction industry.

5. I am making the following comments in my private capacity as a professor, experienced practitioner and interested citizen based upon my some fifty years of experience in the construction industry.

6. As I have previously stated in these proceedings, I strongly disagree with the conclusion that allowing contractors to employ the helper classification throughout the entire construction industry will enhance work opportunities for minorities or women. To the contrary, the increased use of helpers will mean that minorities and women who have gained higher wages and access to fringe benefits such as pension and health programs will experience immediate loss of employment, displaced by helpers who will not have access to training programs or fringe benefit programs.

7. Rather than utilize minorities and women as untrained, low wage "helpers," it is my opinion that formal training programs are essential to recruit and train such workers for the construction industry. Under the new helper regulation, it is my opinion that minorities and women who have achieved employment in the building trades and are currently enrolled in *bona fide* craft apprentice programs will be replaced with lower paid and untrained helpers.

8. The impact on minority and female employment from the helper regulation is most prominent with regard to laborers. Laborers are utilized throughout the

industry to tend journeymen mechanics and to perform the other duties enumerated in the new helper definition. Contractors utilizing laborers in this manner compensate them at wage and fringe benefit levels above those received by helpers. If the helper regulations are put into effect, laborers will be replaced with helpers at much lower wage rates, and contractors continuing to employ laborers will no longer be competitive on public construction projects.

9. The Laborers' International Union with over 500,000 members employed in the construction industry is composed of workers who are minorities, including Blacks, Hispanics, Portuguese and virtually every other minority. The rate at which minority and female laborers are currently being trained demonstrates the manner in which the helper regulation will have a particular and immediate adverse impact on the employment of minority and female laborers. Under the auspices of the Laborers'-Associated General Contractors (AGC) Educational and Training Fund (which is a jointly sponsored labor-management training fund), there were 31,913 construction laborers who received training in 1989 from 73 local training funds located through-out the United States and in Canada. Forty percent (40%) of these laborers' trainees were minorities and women. It is these very workers who will lose employment or face a reduction in wage and fringe benefits if the helper rule goes into effect. Moreover, if their future employment is reduced, the contribution levels to the training funds will be reduced because it is normally based upon manhours worked. Thus, long-term training and skill levels for the industry will erode. This impact will be immediate as the funding levels will be impacted as soon as employment drops due to the implementation of the helper regulation.

11. Thus, the result of the helper regulation will be an immediate reduction of employment of both laborers

who tend the journeymen and the skilled journeymen either because union contractors will no longer be able to successfully bid for public contracts or because contractors will seek to reassign work to the lower paid helper classification through the conformance procedure.

Further affiant sayeth not.

/s/ John T. Dunlop
JOHN T. DUNLOP

Subscribed and sworn to before me this 17th day of December, 1990.

/s/ [Illegible]
Notary Public

My commission expires:
March 21, 1991

APPENDIX BB

KS87-2

	Basic Hourly Rates	Fringe Benefits
Air Conditioning Mechanics	8.00	
Bricklayers	11.03	
Carpenters	10.00	
Cement Masons	9.00	
Electricians	8.65	
Laborers:		
Unskilled:		
General	5.00	
Semi-Skilled:		
Carpenter Tender	6.00	
Mason Tender	6.00	
Plasterers' Tender	6.00	
Skilled:		
Air Tool Operators	8.79	
Jackhammer Operator	8.79	
Mortar Mixer	8.79	
Concrete Saws	8.79	
Painters:		
Brush	6.93	
Spray	7.21	
Plumbers	9.00	
Roofers	7.14	
Sheet Metal Workers	8.00	
Soft Floor Layers:		
Carpet	11.50	
Resilient	8.67	
Tile Setters	7.00	
Truck Drivers	6.00	
Power Equipment Operators:		
Backhoe	8.58	
Blade	8.50	
Bulldozer	7.67	
Graders	7.76	
Loader	8.14	

Mechanic	7.75
Rollers	7.03
Scapers	7.45
Trenching Machines	8.36

KS-87-9

	Basic Hourly Rates	Fringe Benefits
Asbestos Workers	15.88	3.45
Boilermakers	18.15	3.50
Bricklayers and Stonemasons	13.25	1.79
Carpenters:		
Carpenters	12.50	1.08
Millwrights and Piledrivermen	12.80	1.08
Electricians	15.35	2.45 + 4%
Cable Splicers	15.60	2.45 + 4%
Elevator Constructors	14.13	4.345 + a
Elevator Constructor Helpers	9.89	4.345 + a
Elevator Constructor Helpers (Prob.)	7.065	
Glaziers	12.90	4.53
* Ironworkers (Excluding Prefab Buildings):	13.74	2.69
Laborers, Building Construction:		
Group 1:		
General Laborers	8.40	1.55
Group 2:		
Concrete breakers, *Mason tenders, Plaster tenders*, Mortar Mixers for plasters, masons and cement finishers, *All stocking scaffold, Clean up for masons.* (Building and wrecking), Sand and Concrete Gun Nozzelmen, Powderman	8.60	1.55
Laborers, Site Preparation and Grading:		
Group 1	6.35	2.30
Group 2	6.60	2.30
Line Construction:		
Lineman	16.97	1.25 + 3½%
Cable Splicers	17.17	1.25 + 3½%
Groundman	10.17	1.25 + 3½%
Powerman	13.97	1.25 + 3½%
Line Truck & Equipment Operators	13.97	1.25 + 3½%
* Metal Building Assemblers (Prefab Building):		

Painters:		
Brush	12.14	.70
Spray	12.84	.70
Plasterers	14.55	
Plumbers & Pipefitters	16.50	2.60
Power Equipment Operators:		
Building Construction:		
Crane with lifting ring	14.55	3.57
Cranes with shovels, 100 ft. of boom or over including jib or 30 tons or over or 2 yd. capacity, 3 drum hoist	13.80	3.57
Cranes & shovels, 200 ft. and over 4 drum hoist, frankie type pile driving machines, & tower cranes and derricks	14.05	3.57
Group 1	13.55	3.57
Group 2	13.15	3.57
Group 3:		
Class A	11.50	3.57

ND87-2

	Basic Hourly Rates	Fringe Benefits
Carpenters	10.09	
Cement Masons/Concrete Finishers		
Laborers:		
Group 1	6.24	
Group 2	6.29	
Group 3	6.44	
Group 4	6.59	
Flagger	5.09	
Line Construction:		
Lineman, Cable Splicer	15.50	1.00 +7½%
Line Equipment Operator	13.95	1.00 +7½%
Groundman	8.93	1.00 +7½%
Truck Drivers:		
Single Axle	8.82	1.25
Tandem	8.94	1.25
Agitator Dumpcrete; Lowboy; Off road heavy duty and dumps, 20 yards and under; Tandem, semi	9.25	1.25
Euclid, over 20 yards	10.02	1.25

WELDERS—Receive rate for craft performing operation to which welding is incidental.

LABORERS

Group 1: General Construction Laborer; Sack Shaker (cement and mineral filler); Pipe Handler; Drill Runner Tender; Salamander Heater and Blower Tenter

Group 2: *Semi Skilled Laborer*: Bulk Cement Handler; Conduit Layer, telephone or electrical; Form Setter (pavement); Gas, electric or pneumatic tool operator; Chipping Hammer, Grinders and Paving Brakers (tamper-dirt) Concrete Vibrator Operator; Chain Saw Operator; Concrete Saw Operator; Concrete Curing Man (not water); Bituminous worker (Shoveler, Dumper, Raker and Floater); Kettleman (bituminous

or lead); Concrete Bucket Signalman; Power Buggy Operator; *Brick and Mason Tender*; Multiplate Pipelayer; Culvert Pipe Layer; *Concrete Finisher Tender, Carpenters Tenders*

Group 3: Caisson Worker; Bottom Man (sanitary sewer, storm sewer, water, and gas lines); Concrete Mixer Operator (one bag capacity); Mortar Mixer

Group 4: Pipe Layers (sanitary sewer, storm sewer, water and gas lines); Drill runner (includes Wagon Churn or Air Track; Powderman, gunite and sandblast, nozzleman, reinforcing steel setter/tiers

TN87-9

	Basic Hourly Rates	Fringe Benefits
Air Conditioning & Heating Mechanics	6.13	
Bricklayers	8.95	
Carpenters	5.93	
Carpet Installers	5.50	–
Cement Masons	5.24	
Drywall Finishers	6.51	
Drywall Hangers	7.04	
Electricians	7.54	
Insulation Installers	7.00	
Ironworkers	4.50	
Laborers:		
Unskilled	3.84	
Mortar mixers	4.25	
Mason Tenders	4.25	
Asphalt Rakers	5.01	
Painers	5.97	
Plumbers & Pipefitters	7.76	
Roofers	6.76	
Sheet Metal Workers	7.48	
Soft Floor Layers	4.63	
Tile Setters	5.25	
Truck Drivers	4.75	
Welders—Rate for Craft		
Power Equipment Operators:		
Backhoe	5.50	
Motor Grader	6.50	
Paver	5.95	
Roller	5.56	
Tractor	4.40	

* * * *

scope of the classifications listed may be added afterward only as provided in the labor standards contract clauses (29 CFR. 5.5 (a) (1) (11)).

CLASS D—Air compressor operator, mechanic helper, locomotive firemen, welding machine operator, deck hand and elevator operators.

FOOTNOTES:

a. Pension Fund: Employer contribution of $11.00 per week for employees on payroll 30 days or more.

b. Seven Paid Holidays: New Year's Day; Memorial Day; Independence Day; Labor Day; Thanksgiving Day; Friday after Thanksgiving Day; Christmas Day. Vacation Pay Credit: Employer contributes 8% of the basic hourly rate for employees with 5 years or more of service or 6% of the basic hourly rate for employees with 6 months to 5 years of service.

LABORERS:

GROUP 1—General laborers, concrete laborers, *cement finisher tender*, *plumber tenders*, building laborers, *carpenter tenders*, asphalt rakers, form strippers, nursery labor, *roofing tenders*, well driller tenders.

TX87-18

	Basic Hourly Rates	Fringe Benefits
Abestos Workers	13.00	3.24
Boilermakers	15.875	3.20
Bricklayers & Stonemasons	11.05	2.50
Carpenters		
Carpenters and Lathers	14.91	2.18
Millwrights	15.16	2.18
Cement Masons	11.65	2.35
Electricians & Cable Splicers	16.20	1.40 +8.8%
* Elevator Constructors:		
Mechanes	14.85	3.87+a
Helpers	70%JR	3.87+a
Helpers (Prob.)	50%JR	
Glaziers	14.61	2.56
Ironworkers	13.04	2.99
Laborers:		
General	9.03	1.10
Mason tender, pipelayer, *cement finisher* tender, scaffold builder, granite and cement worker, mixer and power tool operator	9.18	1.10
Plaster tender, *hod carrier*, mortar mixer, *lather tender*, and water and damp proofers	9.33	1.10
Machine operator, powderman, sand-blaster, blaster and concrete stack	9.48	1.10
Line Construction:		
Linemen	17.18	1.00 +3.5%
Groundmen	8.59	1.00 +3.5%
Marble, Tile & Terrazzo Workers	15.00	1.60
Marble, Tile & Terrazzo Finishers:		
Marble, tile, terrazzo	8.78	1.31
Floor machine operator	8.98	1.31
Base machine operator	9.13	1.31

Painters:		
Group 1—Journeyman painters, taping & floating of Sheetrock	14.00	
Group 2—Spray: sandblasting swing stage	14.50	
Plasters	15.04	2.36
Plumbers & Pipefitters	18.00	1,32
Power Equipment Operators:		
Group 1	13.75	1.75
Group 2	11.25	1.75
Group 3	10.00	1.75
Group 4	8.25	1.75
Roofers:		
Roofers; deckmen	8.81	.92
Kettlemen	8.33	.92
Waterproofers	8.27	.92

TX97-1

Line Construction:		
Zone 1—Childress Co.:		
Lineman; Operators	14.30	1.00 +3.5%
Cable Splicers	14.55	1.00 +3.5%
Groundman	70%JR	1.00 +3.5%
Zone 2—Armstrong, Carson, Castro, Collingsworth, Dallam, Deaf, Smith, Donley, Gray, Hansford, Hartley, Hemphill, Hutchinson, Lipscomb, Moore, Ochiltree, Oldham, Potter, Randall, Roberts, Sherman, Swisher & Wheeler Cos.:		
Linemen	14.48	2.10 +3.5%
Cable Splicers	15.93	2.10 +3.5%
Groundmen	9.57	2.10 +3.5%
Operator-hole digger, line truck	11.15	2.10 +3.5%
Flat bed truck driver	8.40	2.10 +3.5%
Painters:		
Group 1—Brush & roller, paperhanger; perfa-taper	12.75	.50
Group 2—Structural steel; swinging stage or chair below 60 ft.	12.87	.50
Group 3—Spray & sandblasters	13.50	.50
Plasterers	16.75	.01
* Plumbers & Pipefitters	14.67	3.19
Power Equipment Operator:		
Group 1	15.15	1.30
Group 2	14.65	1.30
Group 3	12.70	1.30
Roofers	8.00	
Sheet Metal Workers	15.76	2.00+3%
Sprinkler Fitters	17.33	3.55

WELDERS—Receive rate prescribed for craft performing operation to which welding is incidental.

CLASSIFICATION DEFINITIONS FOR LABORERS

CLASS I—All work of the trade not covered by other classification herein; including but not limited to: all hand digging and dirt work; backfilling; *loading and unloading of tools and equipment; handling of lumber, steel, cement; distribution of materials;* flagging trucks; wrecking and razing of buildings and structures; *storing materials and tools in and out of receiving lots and sheds;* dumper; spotter; *carpenter tender;* drill tenders; concrete grademen; metal pan and steel form men; concrete flagmen; concrete burner; tank cleaning; placing and cleaning of all pipe and conduit used in placing of concrete.

CLASS II—Gunnite rebound man; sandblaster (potman); *cement mason tender; rod carrier;* mortar mixers; *plaster tenders and brick mason tenders;* gunnite mixing machines; powdermen and blasters; sandblaster; gunnite workers; terrazzo grinders; air power tool operators; power buggy operator; cutting torch operators; machine

* * * *

R187-1

c. 9 Paid Holidays: A through F, plus V.J. Day, Columbus Day & Veterans Day.

d. One year's seniority—one week's paid vacation; 2 years' seniority—2 weeks' paid vacation.

e. 7 Paid Holidays: A through F, plus Columbus Day provided employee has been employed 5 working days prior to the holiday and provided the employee works the scheduled work days immediately preceding and following the holiday.

f. Paid Holidays: A through F, plus Washington's Birthday, Columbus Day, Veteran's Day and V-J Day, providing Employee has worked at least one day in the calendar week in which the holiday falls.

g. Employee who has been on the Payroll for 1 year or more but less than 5 years and has worked 150 Days during the last year of employment shall receive 1 week's paid vacation; 5 to 10 years—2 weeks' paid vacation; 10 or more years—3 weeks' paid vacation.

*AREA DESCRIPTIONS

*CEMENT MASONS and PLASTERERS:

Area 1: County of Newport (with regard to cement masons on building construction, only Goat, Gould, Dutch, Rose, Prudence and Coasters Harbor Island, Tiverton, Portsmouth and Sakonnet), and the Towns and Cities of Barrington, Bristol, Warren, Coventry, East Greenwich, Warwick, West Warwick, Central Falls, Cranston, Cumberland (with regard to plasterers, only the southern one-third of Cumberland), East Providence, Foster, Glocester (except for cement masons on heavy and highway construction), Johnston, Lincoln, North Providence, Pawtucket, Providence, Scituate, Smithfield, Exeter, North Kingstown, Narragansett.

Area 2: Remainder of State.

CLASSIFICATION DESCRIPTIONS

LABORERS (BUILDING CONSTRUCTION)

Class 1: Laborers; *carpenters tenders; mason tenders; cement finisher tenders;* scaffold erectors; wrecking laborers.

Class 2: Asphalt rakers; adzeman; pipe trench bracers; demolition burners; chain saw operators; fence & guard rail erectors; setters of metal forms for roadways; mortar mixers; pipelayers; riprap & dry stonewall builders; highway stone spreaders; pneumatic tool operators; wagon drill operators; tree trimmers; barco-type jumping tampers.

Class 3: *Plasterers' tenders.*

Class 4: Plasterers' tenders—pumping machine operators.

Class 5: Pre-cast floor & roof plank erectors.

Class 6: Air track operators; hydraulic and similar self-powered drills; block pavers; rammers & curb setters; asbestos removers; powdermen; blasters

WV87-2

LABORERS

AREA 1—Boone, Clay, Fayette, Kanawha, Nicholas, Putnand & Roane Counties

AREA 2—Barbour, Braxton, Doddridge, Gilmer, Grant, Hampshire, Hardy, Harrison, Lewis, Marion, Mineral, Monogalia Pendleton, Preston, Randolph, Taylor, Tucker, Upshur & Webster Counties.

AREA 3—Greenbrier, McDowell, Mercer, Monroe, Pocahontas, Raleigh, Summers & Wyoming Counties.

AREA 4—Cabell, Lincoln, Mason & Wayne Counties.

AREA 5—Logan & Mingo Counties

GROUP 1—Laborers; *carpenter tender*; flagmen; water boy; demolition worker; fire watch; landscape laborer.

GROUP 2—Powderman helper; *semi-skilled laborer*; scaffold builders; grade checker; signal man; *brick masons tenders; plasterer tenders; cement finishers tenders; stone masons tenders; lathers tenders tile setters tenders;* mortar mixers jackhammer operators; vibrator operators; tamper operators; pavement buster operators; chipping & peening hammer operators; air siphon & air pump operators; riprap finishers; concrete saw operators; concrete technician; power saw operators; chain saw operators; motorized buggy operators; pipelayers helpers; drill operators helpers; sheeters & shorers; post hole digger operators; asphalt rakers lance and/or water blaster operators; blacksmith helpers; batch house scale operators; workmen working with acid mortar, acid brick, acid or mastic asphalt; workmen working creosote, nozzlemen for gunnite or sandblasting; tool room attendants; ride or walk roller tampers.

GROUP 3—Blacksmith; Powdermen; air track operator; pipe layer (including laser beam set-up); burner.

AREA 6—Calhoun, Jackson, Pleasants, Ritchie, Tyler, Wirt & Wood Counties

GROUP 1—Laborers; carpenter tender; water boy; demolition worker; fire watch; landscape laborer.

GROUP 2—Powderman helper; *semi-skilled laborer*; scaffold builders; grade checker; signal man; *brick masons tenders; plasterer tenders; cement finishers tenders; stone masons tenders; lathers tenders; tile setters tenders;* mortar mixers; jackhammer operators; vibrator operators; tamper operators; pavement buster operators; shipping & peening hammer operators; air sysphon & air pump operators; riprap finishers; concrete saw operators concrete technician; power saw operators; shain saw operators; motorized buggy operators; pipelayers helpers; drill operators helpers; sheeters & shorers; post hole digger operators asphalt rakers; lance and/or water blaster operators; blacksmith helpers; batch house scale operators; workmen working with acid mortar, acid brick, acid or mastic asphalt workmen working cerosote; nozzlemen for gunnite or sandblasting; tool room attendants; ride or walk roller tampers.

GROUP 3—Blacksmith; air track operator; pipe layer (including laser beam set-up); burner.

AREA 7—Marshall, Ohio & Wetzel Counties.

GROUP 1—Laborers; carpenter tender; flagman; water boy; fire watch; landscape laborer; tool room attendants

GROUP 2—Powdermen helper; *semi-skilled laborer*; scaffold builders; grade checker; signal man; *brick masons tenders; plasterer tenders; cement finishers tenders; stone masons tender;* jackhammer operators; vibrator operators; tamper operators; pavement buster operators; chipping & peening hammer operators; air siphon & air pump operators; riprap finish-

ers; concrete saw operators; concrete technician; power saw operators; chain saw operators; motorized buggy operators; pipelayers helpers; drill operators helpers; sheeters & shorers; post hole digger operators; asphalt rakers; lanch and/or water blaster operators; blacksmith helpers; batch house scale operators; workmen working with acid mortar, acid brick, acid or mastic asphalt; workmen working creosote; nozzlemen for gunnite or sandblasting; ride or walk roller tampers; demolition work; leadman on concrete pump hose; deep ditch vertical 6 ft. or more; scaffolding work over 50 ft. (inside and outside).

GROUP 3—Blacksmith; powdermen; air track operator; pipe layer (including laser beam set-up); burner.

AREA 8—Brooke & Hancock Counties.

GROUP 1—General laborers, flagmen; *carpenter tenders*, toolroom men, and drinking water supplier, landscapers.

GROUP 2—All Brick Handlers, *Tenders for Brick Masons/Plasterers/Stone Masons/Tile Setters.* Mortormen for Masons and Plasterers and Men Mixing Cement for Cement Finishers, Scaffold Builders, Mortar Mixer Machine Operator.

GROUP 3—Laborers Operating Concrete Busters, Jack Hammers, Air Spades, Chipping Hammers, Air Tampers, Vibrators, Power Buggy, Concrete Saw, Powersaw, Sandblaster, Acetylene Burners, Scuba Diver, Panel Cleaning Machine Operators, Signalmen, All Power Driven Tools, Air Pump, Air Blow Pipe, Pipelayer and Helper Working in Ditches or Tunnels, Hand Spikers on Railroads, and Laborer Handling Concrete to Test or working with Tar Acid, and Creosote

GROUP 4—Laborers performing work pertaining to or in connection with and repair of Stoves, Blast Furnaces, Basic Oxygen Process Furnaces, Kilns, Soaking Pits, Coke Batteries on Industrial Work.

PA87-10

Group 4	14.52 .75 +26.6% +d
Group 5	13.62 .75 +26.6% +d
Group 6	12.36 .75 +26.6% +d
Truck Drivers:	
Truck Drivers, Pick-ups, dump service trucks, flat trucks, to and including Z highway license plates	13.01 e+f
Transmit mix, which trucks, tractor all types euclids, ross lumber and over Z plates	13.27 e+f

Welders—Receive rate prescribed for craft performing operation to which welding is incidental.

Unlisted classifications needed for work not included within the scope of the classifications listed may be added after award only as provided in the labor standards contract clauses (29 CFR, 5.5(a)(1)(ii)).

LABORERS CLASSIFICATIONS DEFINITIONS

Group 1: General Laborers: Air, fuel and electric tool operators and all other pneumatic and mechanical tools, including blow-pipe and vacuum cleaners. Cassion workers (top men), pipelayers for all clay, terra cotta, ironstone, vitrified concrete or non-metallic pipe & the making of joints for same. Power-buggy, precast slab placer & signal men, Blaster helper, excavation of all foundation digging of trenches, piers and manholes. Wrecking and moving of all structures. Underpinning & shoring, stripping, dismantling, oiling & moving of concrete forms, *loading and carrying, of reinforcing steel, handling & distribution of lumber, and all other building materials to stock piles, unloading, carrying, distribution, and laying precast concrete slaps and planks for flooring & roofing, general cleanup & removal of refuge, debris, and all scrap materials(s)*, vibrator operator (concrete placing—whose power is supplied by compressed air, electric, gasoline & any other means).

Group 2: *Semi-Skilled*: Cassion worker (bottom men), blasters, wagon air track and diamond point drill operators, burning torches, green cutting machine (nozzle men), and steam jenny. *Plasterer & Cement mason tenders*, machine mixers, plasterer pump and scaffold builders (excluding masonry scaffolding). Sand blasting (nozzle man).

Group 3: Nursery Workers, window washers, floor scrubbers, and watchmen. Tenders of propane gas burners, salamander(s), smudge pots, tool room workers. Fire watch.

Group 4: *Mason Tenders: (Brick & Block)*, machine mixers, motorized stockers, scaffold builders (masonry), motor pump, conveyors, mechanical cleaners and sandblasting for masonry and masonry equipment.

PA87-9

AREA COVERED BY TRUCK DRIVERS ZONES

Zone 1—Lehigh County

Zone 2—Northampton County

Zone 3—Berks County

LABORERS CLASSIFICATIONS DEFINITIONS

Zone 1—Berks County

Class 1—General Laborers

Class 2—Operators of jackhammer, paving breaking and other pneumatic, electrical and mechanical tools coming under the jurisdiction of laborers, laying of all clay terra cotta, ironstone vitrified concrete or non-metallic pipe and the making of joints for same, wagon drill operators and concrete power buggies, and pouring and placing of all concrete and related materials

Class 3—Cofferdam, (below 10'), tunnel free air muckers

Class 4—Handling and using cutting or burning torches in the wrecking of buildings

Class 5—*Mason Tenders*, scaffold builders, mobile lifting, platform scaffolding by any power or mode or method, removal for mason and power buggies

Class 6—Blaster

Class 7—Forklift laborers/mason tenders

Class 8—*Plasterers tenders, scaffold builders and removal for plasterers*

Class 9—Asbestos removal

Zone 2—Lehigh & Northampton Counties

Class 1—General laborers, window cleaners, fire watch, signal person, flag person and general clean up and removal of refuse, debris and all other scrap materials

Class 2—Operator of jackhammer, paving breaking & other pneumatic & mechanical tools coming under the jurisdiction of laborers, laying of all clay, terra cotta, ironstone, vitrified concrete on non-metallic pipe and the making of joints for same and cofferdam (below 10'), all vacuum cleaners and motorized sweepers, plastic liners and hypalon liners and the making of all joints for the same

Class 3—Wagon drills and men handling and using burning torches

Class 4—Plasterer & mason tenders, forklift laborers/ mason tenders, scaffold builders *& handling of all materials and equipment, including cleaning, to be used by plasterers, cement finishers and masons, brick & block loaded on pallets, cement finisher and sandblaster helpers*, power buggies, all floor hardener and "cure" application shall be the work of the mason tender, all pumps, such as the concrete, plaster, mortar & water, installing plastic or other non-solid refactory materials in connection with boiler work, all concrete hook-up assembly pumps including mudjack equipment, placing of all concrete with a concrete pump, by any mode or method, including handling of hoses, etc.

Class 5—Bell men, bottom men and phone men or any other means of communication on the stoves and ovens of blast furnace jobs

Class 6—Barko tamper operator and asbestos removal

Class 7—Handling and using dynamite if licensed to blast

* * * *

TX87-10

	Basic Hourly Rates	Fringe Benefits
Asbestos Workers	18.19	3.23
Boilermakers	15.875	3.20
Bricklayers & Stonemasons	11.00	2.55
Carpenters		
Carpenters	13.66	2.42
Piledrivermen	13.66	2.42
Millwrights	13.99	2.42
Cement Masons:		
Galveston County	13.47	2.05
Harris County	13.43	2.18
Electricians:		
Galveston County:		
Electricians	16.88	1.81 +12%
Cable Splicers	17.68	1.81 +12%
Technicians—performs calibration, loop check, and/or function test of process instrumentation equipment and/or systems on petro-chemical processing plants and/or related storage facilities or utility power-house installations and/or related fuel processing facilities	17.68	1.81 +12%
Harris County	17.98	1.68 +12%
Elevator Constructors:		
Mechanics	16.13	3.87+a
Helpers	11.29	3.87+a
Helpers (Prob)	8.065	
Glaziers	13.67	2.50
Ironworkers	13.44	3.25
Laborers:		
Group 1—*Unskilled laborers*	6.00	1.94
Group 2—*All other laborers*	10.00	1.94
Lathers (Harris Co. Only)	15.62	1.08

Line Construction:		
Zone 1—Galveston Co. & that part of Harris co. from Loop 610 east to state Hwy. 59, north on State Hwy. 59, Hwy. 1960 west on Hwy.1960 to Hwy. 6, south on Hwy. 6 to State Hwy. 59, southeast on State Hwy. 59 to Loop 610 around Loop 610 to State Hwy. 59 North:		
Linemen & Cable Splicer	18.68	1.00 +3.5%
Groundman	10.75	1.00 +3.5%
Zone 2—Remainder of Harris Co.:		
Linemen & Cable Splicer	18.28	1.00 +3.5%
Groundman	10.52	1.00 +3.5%
Marble, Tile & Terrazzo Workers	14.60	2.05
Marble, Tile & Terrazzo Finishers	9.70	1.05
Painters:		
Galveston County & East Harris County:		
Group 1—Painters on new work	14.945	3.20
Group 2—Painters on swinging stage		

TX87-9

	Basic Hourly Rates	Fringe Benefits
Asbestos Workers	10.76	
Bricklayers	11.10	1.77
Carpenters	7.33	
Cement Masons	6.13	
* Electricians:		
Electricans	14.30	1.70 +3½%
Cable Splicers	14.55	1.70 +3½%
Glaziers	6.24	
Ironworkers	12.75	2.95
Laborers:		
Unskilled	4.49	
Mason Tenders	6.61	1.03
Lather & Plaster Tenders	5.25	
Lathers	9.50	
Painters, Brush	7.70	.70
Plasterers	8.48	1.03
Plumbers & Pipefitters	13.57	1.77
Roofers	6.51	
Sheet Metal Workers	14.30	2.17+3%
Soft Floor Layers	7.73	
Sprinkler Fitters	17.33	3.55
Tapers	6.26	
Terrazzo, Marble & Tile Workers	7.75	
Terrazzo, Marble & Tile Finishers	4.90	
Power Equipment Operators:		
Backhoes	8.74	1.45
Forklifts	8.17	1.03
Foundation Drills	9.71	

OK87-14

AREA III: Comanche, Jackson Stephens, Harmon, Greer, Kiowa, Tillman, Cotton and Jefferson

AREA IV Marshall County

* IRONWORKERS:

AREA I Blaine, Caddo, Carter, Comanche, Custer, Dewey, Garfield, Garvin, Grady, Johnston, Kingfisher, Kiowa, Major, Murray, Noble, Pontotoc, Roger Mills, Stephens, Washita, Woodward County

AREA II Beckham, Greer, Harmon, Jackson, Tillman, Cotton, Jefferson and Love Counties

AREA III Harper and Ellis Counties

AREA IV Marshall County

AREA V Alfalfa, Grant, Kay, and Woods Counties

* LABORERS:

AREA I —Johnston, Kay, Nobile and Pontotoc Counties

AREA II —Alfalfa, Beckham, Blaine, Caddo, Carter, Camanche, Cotton, Custer, Dewey, Ellis, Garfield, Garvin, Grady, Grant, Greer, Harmon, Harper, Jackson, Jefferson, Kingfisher, Kiowa, Love, Major, Marshall, Murray, Rooger Mill's, Steven's, Tillman, Washita, Woods, Woodward Counties

Group I—All digging and diret work, firing of salamanders and portable space heaters. *All loaded and unloading*

of materials and equipment to and from hoist or cages for stock piling only. Wheeling and placing of concrete. Handling of lumber, steel, cement and distribution of materials. All cleaning including cleaning of windows. All wrecking and razing of buildings and all structures cleaning and cleaning of debris. *Loading and unloading of materials, hoist or cages, except when the man is directly tending lathers, masons or plasterers. Wa*ter boys, when used. *Carpenter tenders.*

Group II—All machine tool operators that come under the jurisdiction of the laborers. All sewer and draintile layers and handling at the ditch, evcluding distribution. Operators of water pumps up to four inches and slip form jackets. *All men erecting scaffolds and directly tending lathers, masons, cement masons and plasterers.* Mortar mixers, hod carriers, and dry mixers. High work over 30 feet from ground or floors. *Cement finisher helper.* Work on swinging scaffold. Work on swinging scaff All kettle and pot men, tank cleaning, all pipe doping treating and wrapping including all men working with dope. Mortar and plaster-mixing machine, pump-

* * * *

OH87-29

AREA 8

Group 1—*Carpenters' Tenders*; Laborers; Flagmen; and Signalmen

Group 2—Air & Machine Driven Tool Ops.; Asphalt Raker & Tamper; Barko & Chain Saw; Bottom Man; Gunnite Machine Op. & Noxxle Man; Hand Spikers; Jackhammer; Power Concrete & Buggies; Sewer Pipelayers; & Wagon Drill

Group 3—*Mason Tenders;* Mortor Mixers; *Plasterers' Tenders*; Asbestos Remover; & Hazardous Material Handler

Group 4—Miners & Muckers for Tunnel Caisson; Powdermen & Blasters

*AREA 9

Group 1: General; *Carpenter Tender*; Landscaper; and Flagmen

Group 2: Brick Handlers; *Tenders for Brick Masons, Plastersers, Stonemasons, & Tile Setters; Mortarmen for Masons & Plasterers*; Men Mixing Cement for Cement Finishers; Scaffold Builders; Mortar Mixer Machine Operator

Group 3: Laborers Operating Concrete Busters; Jack Hammers; Air Spades; Chipping Hammers; Air Tampers; Vibrators; Power Buggy; Concrete Saw; Power Saw; Sandblaster; Acetylene Burners; Panel Cleaning Machine Ops.; Power Driven Tools; Air Pump; Air Blow Pipe; Pipelayer & Tenders Working in Ditches or Tunnels; & Laborers Handling Concrete For Test or Working with Tar, Acid, Creosote; & Asbestors, 2″ & Under; and Signalmen

Group 4: Laborers performing work pertaining to or in connection with & Repair of Stoves, Blast Furnaces,

Basic Oxygen Process Furnaces, Steeples & Stacks, Annealing Process Furnaces, Kilns, Soaking Pits, Coke Batteries on Industrial Work; Demolition of Stacks 50′ to 100′; Tunnel Laborers; Muckers including Caissons & Coffers, Horizontal & Underground

Group 5: Blastermen & Tenders; Bellman & Lancer; Bottom Men in Blast Furnaces, Stacks, Stoves & Dust Catchers; Mud Men & Laborers Working with Carbon Brick & Handling Bottom Block on Blast Furnaces, Stacks, Stoves & Dust Catchers

*Group 6: Ditches, Trenches, Caissons and Coffers over 6′ deep, open top

*Groups 7: Miners including Caissons and Coffers, Horizontal or Underground; Mucksing Machine Operators

*Group 8: Demolition of Stacks 100′ to 150′

*Group 9: Gunite Nozzleman & Gunite Machine Operator —Grout Nozzlemen & Grout Machine Operator

*Group 10: Demolition of Stacks over 150′

AREA 11

Group 1—Laborers

Group 2—*Tenders for Bricklayers, Masons &* Flexicore

Group 3—*Tenders for Plasters & Lathers*

* * * *

working in tunnels; head form setters & stringline men; hot tar applicator

Group 4—Flaggers

LABORERS CLASSIFICATION DEFINITIONS
SALINE COUNTY

GROUP 1—Common labor, wire mesh handlers or setters, carpenter tender; trackperson; signalperson; salamander tenders; landscape person; sod layers; wreckers (for alteration or entire projects) plumber laborers (conduit pipe, sewer work, drain tile & duct lines, digging & back filling); power tool operators; pier hole diggers (over 10 ft.); jackhammer & chipping hammer ops.; chain saw ops.; concrete saw ops.; brush feeders or pulverizers; reinforcing steel handlers; air tamp ops.; ditch witch ops.; swinging scaffolds; georgia buggies, self-propelled; fork lift; hose person; insulation person

GROUP 2—Vibrator op.; Fork lift (masonry); *brick tenders; plasterer tenders; stone mason tenders (includes all hod carrier classifications previously shown as mortar person & scaffolding)*

GROUP 3—Cutting torch or burner person; barco, jackson or similar tamp ops.; asphalt rakers; powder person; mastic hot kettle person; sandblasting & gunnite nozzleperson; wagon & churn drill ops.

GROUP 4—Flaggers

POWER EQUIPMENT OPERATORS:

GROUP 1—Asphalt paver and spreader; asphalt plant mixer operator; asphalt plant operator; back fillers; backhoe; barber-greene loader; blade-power; boats-power; boilers (2) boring machines; cableways; cherry-

pickers; chip spreader; concrete ready-mixing plant, portable (job site) concrete mixer pavers crane-overhead; crusher, rock; derricks and derricks cars (power operated); ditching machines, dozers; dredges—any type power; grade-all similar type; hoist, endless chain-power operater with power travel; loaders; mechanic and welder; mucking machine; orange peels; pumps—material; push cats; scoops; self-propelled rotary drill shovel, power; side boom; skimmer scoop; testhole machine; throttle man

* * * *

jackhammer, and chipping hammer operators; chain saw operators; concrete saw operators; brush feeders on pulverizers; reinforcing steel handlers; air tamp operators; ditch with operators; swinging scaffolds; georgie buggies (self-propelled); fork lift; hose person; insulation person; signal person

GROUP II

Vibrator operator; fork lift (masonry, brick tender, plaster tender, stonemasons tender (includes all hod carriers classifications previously shown as mortar men and scaffolding).

GROUP III

Barco, Jackson or similar tam operators; asphalt rakers; powder person; mastic hot kettle person; sandblasting and gunnite nozzle person; wagon and churn drill operators; cutting torch or burner person.

GROUP IV

Flaggers

LABORERS: (BUILDING CONSTRUCTION—ZONE 3)

Group I

General laborers—carpenter tenders, track men, wreckers, reinforcing rod carriers, and all other general laborers, plumbers laborers sewer work, water lines, conduit pipe, drain tile and duck lines, batter board man on pipe and ditch work

GROUP II

First Semi-Skill—Stone mason tenders, air tool operators, pier hole men working below ground, vibrator

man, jack hammer, chipping hammer operators, material batch hopper man, scale man, spreader or screed man on asphalt machine, chain or concrete saw, brush feeders on pulverizers, swining scaffold, cement handlers (bulk or sack), laser beam man

GROUP III

Second Semi-Skill—Plaster tenders, hod carriers, brick tenders, cutting torch and burner men, asphalt rakers, barco tamper, jackson or any similar tamps, power buggy operator, powderman, mastic kettleman, sandblasting and gunnite nozzleman, head pipe layer on sewer work, men working tunnels, head forms and stringline men, hot tar applicator.

GROUP IV

Flaggers

LABORERS: Site Preparation (ZONE 4)

Group I

Carpenter tenders; salamander tenders; (dump man and ticket takers on stock piles;) loading trucks under bins, hoppers and conveyors, track men and all other general laborers; air tool operators; cement handler bulk or sack); chain or concrete saw; deck hands; dump man on earth fill; grade checkers on cuts and fills; georgie buggies man; material batch hopper man; scale man; material mixer man (except on manholes); coffer dams, abutments and pier hol men working below ground); riprap pavers rock, block or brick scaffolds

* * * *

Area 3: Benton, Boone, Carroll, Cass, Clinton, Fulton, Howard, Miami, Montgomery, Tippecanoe, Tipton & White Counties

Area 4: Marion & Shelby Counties

Area 5: Fountain, Hendricks & Warren Counties

Area 6: Bartholomew, Johnson, Monroe & Morgan Counties

POWER EQUIPMENT OPERATORS

Area 1: Fulton & Noble Counties

Area 2: Boone, Fountain, Hendricks, Monroe, Montgomery, Morgan & Warren Counties

Area 3: Bartholomew County

Area 4: Remainder of Counties

TRUCK DRIVERS

Area 1: Hamilton, Hancock, Hendricks, Johnson, Marion, Morgan & Shelby Counties

Area 2: Benton, Boone, Carroll, Cass, Clinton, Fountain, Howard, Miami, Montgomery, Tippecanoe, Tipton, Wabash, Warren & White Counties

Area 3: Fulton County

Area 4: Bartholomew, Blackford, Delaware, Grant, Jay, Madison & Monroe Counties

*CLASSIFICATION DEFINITIONS
LABORERS AREAS 1, 2, 4 & 6

Group 1—Building and Construction Laborers; Scaffold Builders (other than for Masons or Plasterers); *Ironworker Tenders;* Mechanic Tenders; Window Washers and Cleaners; Water Boys and Tool Housemen; *Roof-*

ers Tenders; Railroad Workers; Masonry Wall Washers; *Cement Finishers Tenders; Carpenter Tenders;* Portable Water Pumps with Discharge up to 3 inches; Signal & Flag Person;

Group 2—Waterproofing; Hauling of Creosote Lumber or like treated material (exclu. railroad material); Asphalt Rakers and Lutemen; Kettlemen; Air Tool Oper.; Pneumatic Tool Op.; Air & Electric Vibrators and Chipping Hammer Op.; Earth compactors; Jackman & Sheetman in Ditches more than 6 feet Deep; Laborers in ditches 6′ deep or deeper; Assembly of Unicrete Pump; Tile Layers (sewer or field); Sewer Pipe Layers; Motor Driven Wheelbarrows and Concrete Buggies; Hyster Op.; Pump Crete Assemblers; Core Drill Op.; Cement, Lime or Silica Clay Handlers; Handling of Toxic Materials Damaging to Clothing; Pneumatic Spikers; Deck Engine & Winch Op.; Water Main & Cable Ducking; Screen Man or Screw Op. On Asphalt Paver; Chain Saw & Demolition Saw Op.; Concrete Conveyor Assembler; Asbestos Removal; Hazardous Waste Removal

Group 3—*Plaster Tenders; Mason Tender;* Mortar Mixers; Welders; Cutting Torch or Burner; Cement Nozzle Laborers; Cement Gun Operators; Scaffold Builders for Plasterers; Scaffold Builders for Masons; Water Blast Mach. Op.

Group 4—Dynamite Men, Drillers-Air Track or Wagon Drilling for Explosives

IA87-10

	Basic Hourly Rates	Fringe Benefits
Carpenters	11.22	1.38
Concrete Finishers	11.12	1.07
Electricans	10.60	1.25 +3.75%
Ironworkers	10.70	1.90
Laborers:		
Unskilled	9.26	1.20
Sawman, joint sealer, power broom	9.46	1.20
Cure machine	9.61	1.20
Form setters, *cement finisher tenders*	9.76	1.20
Jackhammer, batching plant scaleman	9.61	1.30
Painters	9.61	1.23
Truck Drivers	10.18	.75
Power Equipment Opertaors:		
Tractor	10.01	1.82
Concrete Mixers	10.46	
Rollers	10.78	2.00
Backhoes	11.24	2.00
Distributors	11.26	2.00
Compactors	11.35	2.25
Paving breakers, finishing machines	11.55	2.25
Graders	11.74	2.07
Slip form pavers, central mix plant, CMI subgrader, front end loaders, asphalt paver screed	11.91	2.00
Asphalt paving machine	11.91	2.09
Greasers, scrapers, cranes, bulldozzers, pushcats, mechanics	12.25	2.25

Group 5: Core Drill Operator; Cutting Torch and Air Arc Operator

AREA 5

Group 1: General Laborers; Form Strippers; Carpenter Tender

Group 2: Concrete Handlers, conveying and handling concrete; Nozzlemen (air or water); Sand Blast Tail Hoseman; Powderman Tender; Power driven Wheelbarrow; Rodder and Spreader; Form Setters (paving); Bucketman (small air tool Operators, including Blow Pipe); Small Power Tool Operators; Rigger; Chuck Tenders; Asphalt Rakers; Dumpman; Rip Rapping; Pipe Wrapper; Pot Tender; Concrete Pumper Hoseman; Jackhammer; Pavement Breakers; Vibrator; Mechanical Tamper and other air tools; Cement Handlers (sack or bulk); Burning Bar

Group 3: Pipe Layers (non-metallic); Metal Culvert Pipe Layer; *Mason and Plaster Tenders; Cement Finisher Tender*; Small Concrete Mixer Operator; Shoring and Lagging open ditches; Concrete Saw; Powderman; Drills, Air-trac, Wagon Drill, cat or truck mounted air operated Drills; Sand Blaster (wet or dry); Gunite Nozzleman; Barcon Tamper; Welder, Laser Equipment and tools; Cutting Torch, Equipment Man

AREAS 6 and 7

Group 1: Axeman; Car and Truck Loaders (weighing loaded trucks); Cosmoline, applying and removing; Concrete Laborer; Chucktenders and Nippers; Crusher Laborer; Form Stripper; General Laborer; Hand Faller; Landscape Laborer; Riprap Tender; Stake Jumper

Group 2: Applicator, hand or nozzle (applying hot protective material of oil or asphalt base); Asphalt

Raker; Barco Tamper; Caulker, Collarman, Jointer, Mortarman; Cement Handler (sack or bulk); Choker Setter; Concrete and Asphalt Saws; Concrete Bucketman; Creosote Material Handler; Curb Machine; Dumpman, Grademan; Dumpman, Spotter; Equipment Handlers (trucks, Bobcats); Form Setters; Gunite, Pumpcrete and Placo Machine Operator; Machine Operator; Jackhammer Operator; Mechanical Tampers; Laser Beam Operator; Pipelayers (all types); Plastic Pipe Layer; Pavement Breaker Operator; Pneumatic and electric tool Operator; Pipe Wrapper; Powderman Tender, Primerhouseman; Power-driven Wheelbarorw; Power Saw (bucking and falling); Rip Wrapper (hand placed); Rodder and Spreader; Shoring and Lagging (Open ditch); Tar Pot Operator

Group 3: Air Track mounted Drills; Air Cat mounted Drills; Cat or truck mounted Drills; Core Drill Operator; High Scaler; Mobile Drills; Nozzleman, concrete (outside); Powderman; Riggers and Jackers; Wagon Drillers

Group 4: *Tenders, Trowel Trades (scaffolding, staging, Forklifts for Masons and Plasterers)*

*AREA 8

Group 1: General Laborers; Form Strippers; Carpenter Tenders; Concrete Handler, conveying and handling concrete

Group 2: Nozzleman (air or water); Sand Blast Tailhoseman; Powderman Tender; Power driven Wheelbarrow; Rodder and Spreader; Form Setters (paving); Bucketman; Rigger Small Air Tool Operators, including Blow Pipes; Small power tool Operators; Chuck tenders; Asphalt Rakers; Dumpman; Rip Rapping; Pipe Wrapper; Pot Tenders; Concrete Pumper Hoseman; Cutting Torch; Jackhammer;

Pavement Breaker; Vibrator; Mechanical Tamper and other air tools; Cement Handlers (sack or bulk); Burning Bar

Group 3: Pipelayers (non-metallic); Metal Culvert Pipelayers; Mason and Plaster Tenders; Cement Finisher Tender; Small Concrete Mixer Operator; Shoring and Lagging Open Ditches; Concrete Saw; Powderman; Drills, Air-trac, Wagon Drill, Cat or Truck mounted air operated Drills; Laser Equipment and Tool, Welder; Sand Blaster (wet or dry); Gunnitemen; Barco Tamper

*AREA 9

Group 1: General and Building Laborers and Form Stripper and Carpenter Tender; Car and Truck Loaders; Concrete Laborers (wet or dry breaking of concrete requiring sledge hammer); Dumpmen (Spotter); Small power tools, Chippers, Clay Spaders, Pogo Stick, etc.; Fenc Erectors and Installers includes installation and erection of fences, guard rails, reference posts, guide posts and right-of-way markers

Group 2: Dumpmen (Grade)

Group 3: Power driven Concrete Buggies or power driven Wheelbarrows; Pipe Layers (non-metallic); Sandblaster, Concrete Nozzleman, Place Operator, Jackhammer, Pavement Breaker, Vibrator (2½" and over); Barco Tamper, Vibrator Turtle; Small Concrete Mixers, Concrete Saw; Nozzleman (air and water); Sandblaster, Tailhoseman, Pot Tender, Tar Pot Tender; Gunite Nozzleman; Caisson Workers (free air); Tunnels and Shafts (free air); Bull Gang, Pot Tender; Chuck Tender, Muckers and Nippers, Primerhouseman

Group 4: *Brick Tenders handling bricks and blocks only*

Group 5: *Hod Carriers and Plaster Tenders (men carrying mortar either by hod, pail or barrow);* High Scaler; Wagon Driller, Cat or truck mounted air operated Drills; Asphalt Rakers and Tampers, Gunit, Form Setter (slab steel forms); Stake Setter, Stake Jumper, Rodder and Spreader, Grademan; Concrete Nozzleman; Miners

Group 6: Powderman; Laser Tools and Equipment; Small Concrete Mixers; Concrete Saw

CERTIFICATE OF SERVICE

I hereby certify that copies of the Reply Brief of Appellant Laborers' International Union of North America, AFL-CIO, were served by United States Mail, first-class, postage prepaid, this 31st day of July, 1991 on:

Maurice Baskin
Patrick J. Stewart
Venable, Baetjer, Howard & Civiletti
Suite 1000
1201 New York Avenue, N.W.
Washington, D.C. 20005

Terry Yellig
Sherman, Dunn, Cohen, Leifer & Yellig
1125 15th Street, N.W.
Suite 801
Washington, D.C. 20005

Robert M. Loeb
Department of Justice, Civil Division
Appellate Staff, Room 3617, Main
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Clint Bolick
Jerald Hill
Mark Bredemeier
Landmark Center of Civil Rights
216 G. Street, N.E.
Washington, D.C. 20002

/s/ Phillis Payne
PHILLIS PAYNE
D.C. Bar No. 239962

APPENDIX CC

§ 276a. Rate of wages for laborers and mechanics

(a) The advertised specifications for every contract in excess of $2,000 to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union or the District fo Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the

difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) As used in this Act [40 USCS §§ 276a et seq.] the term "wages", "scale of wages", "wage rates", "minimum wages", and "prevailing wages" shall include—

(1) the basic hourly rate of pay; and

(2) the amount of—

(A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits: Provided, That the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor, insofar as this Act [42 USCS §§ 276a et seq.] and

other Acts incorporating this Act [42 USCS §§ 276a et seq.] by reference are concerned may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2)(A), or by the assumption of an enforcible commitment to bear the costs of a plan or program of a type referred to in paragraph (2)(B), or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2).

In determining the overtime pay to which the laborer or mechanic is entitled under any Federal law, his regular or basic hourly rate of pay (or other alternative rate upon which premium rate of overtime compensation is computed) shall be deemed to be the rate computed under paragraph (1), except that where the amount of payments, contributions, or costs incurred with respect to him exceeds the prevailing wage applicable to him under this Act [42 USCS §§ 276a et seq.], such regular or basic hourly rate of pay (or such other alternative rate) shall be arrived at by deducting from the amount of payments, contributions, or costs actually incurred with respect to him, the amount of contributions or costs of the types described in paragraph (2) actually incurred with respect to him, or the amount determined under paragraph (2) but not actually paid, whichever amount is the greater.

(Mar. 3, 1931, c. 411, § 1, 46 Stat. 1494; Aug. 30, 1935, c. 825, 49 Stat. 1011; June 15, 1940, c. 373, § 1, 54 Stat. 399; July 12, 1960, P. L. 86-624, § 26, 74 Stat. 418; July 2, 1964, P. L. 88-349, § 1, 78 Stat. 238.)

Public Law 102-27
102d Congress

* * * *

TITLE III—GENERAL PROVISIONS

* * * *

SEC. 303. Notwithstanding any other provision of law, no funds shall be expended by the Secretary of Labor to implement or administer the regulations published at 54 Federal Register 4234-44 (January 27, 1989) to be codified at 1.7(d), 5.2(n)(4), 5.5(a)(1)(ii)(A) and 5.5(a)(4)(iv) of title 29 of the Code of Federal Regulations or to implement or administer any other regulation that would have the same or similar effect. No funds shall be expended by the Secretary of Labor to implement or administer revisions to part 29 of title 29 of the Code of Federal Regulations published at 55 Federal Register 34868-34876 (August 24, 1990) to the extent such revisions affect apprenticeship programs in the construction industry.

* * * *

§ 553. **Rule making**

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a descripiton of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data,

views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Supreme Court, U.S.
FILED
SEP 2 1992
OFFICE OF THE CLERK

No. 92-130

In the Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, ET AL., PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ANTHONY J. STEINMEYER
ROBERT M. LOEB
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. A regulation (29 C.F.R. 1.7(d)) promulgated by the Department of Labor to implement the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, permits contractors on federal construction projects to employ semi-skilled "helpers" if the classification is "prevailing" in the applicable geographic area. The first question presented is whether the Secretary violated the Davis-Bacon Act or the Administrative Procedure Act, 5 U.S.C. 706, in promulgating the regulations (29 C.F.R. 1.7(d)(1) and (2)) defining when a helper class is "prevailing" in a given area.

2. Whether a provision in a 1991 supplemental appropriations Act that prohibited the Secretary from expending funds to implement or administer the helper regulations permanently suspends the effect of those regulations, even though the relevant provision contains no words of futurity or permanence.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	11
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Batterton v. *Francis*, 432 U.S. 416 (1977)	11
Building & Construction Trades Dep't v. *Donovan*, 464 U.S. 1069 (1984)	12
Cella v. *United States*, 208 F.2d 783 (7th Cir. 1953), cert. denied, 347 U.S. 1016 (1954)	18
Chiles v. *Thornburgh*, 865 F.2d 1197 (11th Cir. 1989)	18
International Union, United Automobile Workers v. *Donovan*, 746 F.2d 855 (D.C. Cir. 1984), cert. denied, 474 U.S. 825 (1985)	20
Minis v. *United States*, 40 U.S. (15 Pet.) 423 (1841)	18
Schweiker v. *Gray Panthers*, 453 U.S. 34 (1981)	11, 12
United States v. *Vulte*, 233 U.S. 509 (1914)	18

Statutes and rules:

Davis Bacon Act, 40 U.S.C. 276a *et seq.*	2
40 U.S.C. 276a(a)	2, 11, 17
Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1992, Pub. No. 102-170, 105 Stat. 1107	20
105 Stat. 1110	20
105 Stat. 1114 (§§ 102-104)	20

Statutes and rules—Continued: Page

Dire Emergency Supplemental Appropriations for Consequences of Operation Desert Shield/Desert Storm, Food Stamps, Unemployment Compensation Administration, Veterans Compensation and Pensions and Other Urgent Needs Act of 1991, Pub. L. No. 102-27, § 303, 105 Stat. 151 ..... 9, 17

29 C.F.R.:

Section 1.2(a) 2, 3
Section 1.2(a)(1) 13
Section 1.3 3
Section 1.5 3
Section 1.6 3
Section 1.7(d) 7
Section 1.7(d)(1) (1991) 12, 13
Section 1.7(d)(2) (1991) 12, 13
Section 5.2(n)(4) 14
Section 5.5(a)(1) 3

Miscellaneous:

138 Cong. Rec.:

p. S13,446 (daily ed. Sept. 15, 1992) 19
p. S13,483 (daily ed. Sept. 15, 1992) 19
p. S14,027 (daily ed. Sept. 18, 1992) 19
pp. S14,038-S14,039 (daily ed. Sept. 18, 1992) 19

Daily Lab. Rep. (BNA) No. 183 (Sept. 21, 1992) 19

54 Fed. Reg. (1989):

p. 4,234 ..... 7, 8, 15
pp. 4,234-4,244 9
pp. 4,327-4,328 15
p. 4,238 ..... 7, 8, 14, 16
p. 4,242 ..... 15, 16
p. 4,243 8

52 Fed. Reg. (1987):

pp. 31,366-31,367 6
p. 31,370 ..... 15, 16

47 Fed. Reg. (1982):

p. 23,647 ..... 3, 4

Miscellaneous—Continued:	Page
pp. 23,650-23,651	15
p. 23,655	4
p. 23,659	3
p. 23,667	4
p. 23,670	4
pp. 31,368-31,371	15
46 Fed. Reg. (1981):	
pp. 41,443-41,470	3
p. 41,445	3
General Accounting Office, *Principles of Federal Appropriations Law* (2d ed. 1991)	18, 19
H.R. 5620, 102d Cong., 2d Sess. (1992)	19

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-130

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, ET AL., PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 961 F.2d 269. The opinion of the district court (Pet. App. 60a-71a) is reported at 116 Lab. Cases (CCH) ¶ 35,395.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1992. The petition for a writ of certiorari was filed on July 20, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. The Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, requires payment of at least locally prevailing wages to workers on contracts exceeding $2,000 with the United States or the District of Columbia for construction on public buildings or public works. In particular, the Act provides that covered federal construction contracts

> shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed.

40 U.S.C. 276a(a). Section 276a(a) therefore provides that the locally prevailing wage for each class of laborers or mechanics is to be "determined by the Secretary." *Ibid.*

Pursuant to that "broad statutory mandate to set wages and classify workers" (Pet. App. 3a), the Secretary has promulgated regulations that provide for determination of the "prevailing wage" rate; specify the kind of data that she will use in the calculations; set forth procedures for particular wage determinations; and describe enforcement procedures. The Secretary has defined the "prevailing wage" as "the wage paid to the majority * * * of the laborers or mechanics in the classification on similar projects in the area during the period in question." 29 C.F.R. 1.2(a). If the same wage is not paid to a majority of the workers in a classification, the Secretary uses "the average of the wages paid, weighted by the total

employed in the classification." *Ibid.* To make that determination, the Secretary compiles wage information categorized by the type of project, locality, and job classification. 29 C.F.R. 1.3. Based on the information, she issues "wage determinations" (29 C.F.R. 1.5, 1.6), and covered contracts must provide for the payment of wages and fringe benefits at rates no less than those established by the Secretary's determination. 29 C.F.R. 5.5(a)(1).

2. Because "wage rates and classifications are essentially two sides of the same coin" and "must be fixed in tandem to ensure that a given wage will be paid for given work" (Pet. App. 49a), the implementation of the Davis-Bacon Act's "prevailing wage" standard requires the Secretary to classify workers for purposes of making wage determinations. Historically, the Secretary has recognized five basic classifications of workers under the Act: (1) journeymen or skilled workers who are identified with traditional crafts and use the tools of the trade; (2) laborers or unskilled workers; (3) apprentices enrolled in apprenticeship programs approved by the Secretary; (4) trainees enrolled in training programs approved by the Secretary; and (5) semi-skilled helpers. *Id.* at 36a. The Secretary included a "helper" classification in a wage determination only if (1) the helper's duties could be differentiated from those of the journeyman, and (2) the helper classification prevailed in the applicable area. *Id.* at 37a; 47 Fed. Reg. 23,647, 23,659 (1982).

On August 14, 1981, the Secretary published a proposed rule revising the Davis-Bacon Act regulations. 46 Fed. Reg. 41,443-41,470. The proposed rule included provisions to broaden the use of the "helper" classification in wage determinations. *Id.* at 41,445. After considering extensive comments on the pro-

posed revisions, the Secretary concluded that broader recognition of a helper classification would better reflect widespread construction industry practice; result in large cost savings to the government; create job opportunities for unskilled and semi-skilled workers, including youth, minorities, and women; enhance productivity by allowing skilled workers to focus more on high-skill tasks; and increase competition for government contracts. 47 Fed. Reg. at 23,647.

Accordingly, the Secretary promulgated several new regulations. First, the new regulations defined "helper" as a "semi-skilled worker * * * who works under the direction of and assists a journeyman." 47 Fed. Reg. at 23,667. Under this definition, a helper may "use the tools of the trade" under a journeyman's supervision, although the "particular duties performed by a helper vary according to area practice." *Ibid.* Second, the regulations provided that a helper classification was to be included in the wage determination if that classification was "identifiable" in the applicable area. *Id.* at 23,655. Third, the regulations limited the maximum number of helpers to two for every three journeymen. *Id.* at 23,670.

3. a. Soon after the new regulations were promulgated, the Building and Construction Trades Department, AFL-CIO, and affiliated unions brought this civil action alleging, *inter alia*, that the new helper regulations were inconsistent with the Davis-Bacon Act. The district court agreed, and enjoined implementation of the regulations. See Pet. App. 76a-78a; see also *id.* at 81a-84a.

b. The court of appeals affirmed in part and reversed in part. The court approved the Secretary's decision to define "helpers" in terms of the level of their supervision by journeymen, rather than by the tasks performed and tools used. Pet. App. 44a-54a.

The court found nothing in the language of the Act that required the use of a task-based classification of workers (*id.* at 47a-48a), and found that limiting the Secretary to that rigid form of classification would thwart the congressional purpose of having federal wages mirror those prevailing in a locality. *Id.* at 50a. In affirming the departure from prior practice, moreover, the court of appeals observed that "the Secretary is not overturning a policy that has worked to perfection," adding that then-existing practice may have caused the federal government to pay wages far above private sector rates in some cases. *Id.* at 52a.

The court, however, held that the new regulation was invalid to the extent that it allowed the helper classification to be used if it was merely "identifiable" in a given area. Pet. App. 41a-44a. Finding that such a rule would permit the use of "helpers" on federal construction projects even if use of such a classification was not a prevailing practice in the area, the court concluded that the rule would "operate[] to undermine the fundamental purpose of the Act: that wages on federal construction projects mirror those locally prevailing." *Id.* at 41a. In the court's view, "if a given lower paid job classification need only be 'identifiable' in the community to be used on a government construction site, the wages paid for some work may well be less than those 'prevailing' for that work in the community." *Id.* at 42a. At the same time, however, the court made clear that the new regulation, "*as modified by the requirement that the classification prevail in an area before it may be used*, [was] an entirely logical response to the problem of federal construction practice not reflecting the widespread, but not universal, practice of using helpers." *Id.* at 53a (emphasis added).

c. On remand, the district court rescinded its injunction as it applied to the definition of "helpers," but left the injunction in place with respect to other aspects of the helper regulations. Pet. App. 101a-103a. The court also indicated that the Secretary "may * * * submit * * * reissued regulations governing the use of helpers, and if these regulations conform to the decision of the Court of Appeals, they will be approved." *Ibid.*

4. Consistent with the district court's order, the Secretary reexamined the helper regulations, inviting comments on several alternative proposals for determining when a helper classification is "prevailing" in a particular area. 52 Fed. Reg. 31,366-31,367 (1987). After an extended comment period, the Secretary issued the following final regulation:

> The use of *helpers*, *apprentices* and *trainees* is permitted in accordance with part 5 of this subtitle. Wage rates for semi-skilled classifications of helpers will be issued when the classifications are prevailing in the area. In determining whether the use of a particular helper classification prevails in the area, the Administrator will follow the criteria set forth in paragraphs (d)(1) and (d)(2) of this section.
>
> (1) If the prevailing wage for a particular journeyman classification is a wage that is paid to the majority of the journeymen * * * , then the practice followed by those contractors whose rates are adopted as prevailing for the journeyman shall also be deemed the prevailing practice in determining whether to issue a helper classification. Any ambiguity with regard to such practice, will be resolved by following the rule in paragraph

(d)(2) of this section with respect to those contractors.

(2) If the prevailing wage for a particular journeyman classification is the average of the wages paid to the journeymen, weighted by the total number of journeymen * * * , then the total number of workers in the classification employed by contractors utilizing helpers (journeymen plus apprentices, trainees, and helpers as defined in § 5.2(n)(4) of this chapter) on reported projects will be compared to the total number of workers in the classification employed by contractors not utilizing helpers (journeymen plus apprentices and trainees as defined in § 5.2(n)(4) of this chapter), and the practice which covers the majority of such workers shall be deemed the prevailing practice in determining whether to issue a helper classification.

54 Fed. Reg. 4,234 (1989), codified at 29 C.F.R. 1.7(d).

Under the new regulation, if a prevailing wage is paid to journeymen on the basis of the wages paid to a majority of journeymen in a particular area, then a "helper" classification may be used if the contractors paying that prevailing wage use helpers. As the Secretary explained, that approach ensures that where union journeymen predominate, helpers will be used on federal projects only if it is the practice, in accordance with applicable collective bargaining agreements, to use helpers. 54 Fed. Reg. at 4,238. Alternatively, if the wage paid to journeymen in a given area is not based on a "majority wage," then a helper classification can be used only if the total number of journeymen, apprentices, trainees, and helpers in a craft on projects employing helpers exceeds the number of journeymen, apprentices, and

trainees on projects where helpers are not employed. 54 Fed. Reg. at 4,234, 4,243. Thus, the prevailing practice is determined by "link[ing] the number of helpers to the number of journeymen with whom the helpers are associated since, under the approved definition, a helper must work under the direction of, and be supervised by, the journeymen." *Id.* at 4,238.

5. a. Following the promulgation of the new regulations, the Secretary moved to vacate the injunction blocking implementation of its helper regulation. Petitioners (the Building and Construction Trades Department, AFL-CIO, and several affiliated unions) opposed her motion primarily on the ground that the new rule's method of determining when helpers are to be allowed is inconsistent with the Davis-Bacon Act and the Administrative Procedure Act (APA). The district court disagreed, finding that "the Secretary has considered a number of alternatives, including several proposed by [petitioners], and * * * has given reasoned explanations for the rejection of some and the selection of the one ultimately adopted." Pet. App. 63a. The court noted, in this regard, that petitioners' disagreement with the new regulations "demonstrate[s] nothing more than that there are several alternatives for determining whether the use of helpers is prevailing." *Id.* at 64a.

b. The court of appeals affirmed in part and reversed-in part.[1] In addition to contesting the district court's ruling under the Davis-Bacon Act and the APA, petitioners relied in the court of appeals on a rider to

[1] The court invalidated the portion of the helper regulations limiting the number of helpers to two for every three journeymen on the job. Specifically, the court found that the Secretary had not adequately explained the basis for that limitation when the rule was promulgated in 1982. Pet. App. 14a-15a. That issue is not before this Court.

a 1991 supplemental appropriations Act prohibiting the Secretary from spending appropriated funds to implement the helper regulations. See Dire Emergency Supplemental Appropriations for Consequences of Operation Desert Shield/Desert Storm, Food Stamps, Unemployment Compensation Administration, Veterans Compensation and Pensions and Other Urgent Needs Act of 1991, Pub. L. No. 102-27, § 303, 105 Stat. 151.[2] The court, however, found that the 1991 appropriations rider did not permanently bar implementation of the helper regulations. Pet. App. 7a-9a. Rather, relying on the canon that a provision in an appropriations Act operates only during the applicable fiscal year "unless its language clearly indicates that it is intended to be permanent" (*id.* at 8a), the court found that the absence of any suggestion of "permanency or futurity" in the language of the rider foreclosed petitioners' reliance on the rider after Fiscal Year 1991. *Id.* at 9a.

The court also rejected petitioners' challenge under the Davis-Bacon Act and the APA to the Secretary's methodology for determining whether a helper classification is "prevailing" in a locality. The court concluded that petitioners had "in no way demonstrated that the Secretary acted arbitrarily in designing the new tests, or that the tests defeat the purpose of the Act by recognizing 'non-prevailing

[2] The rider provided (§ 303, 105 Stat. 151) in relevant part:

> Notwithstanding any other provision of law, no funds shall be expended by the Secretary of Labor to implement or administer the regulations published at 54 Federal Register 4234-44 (January 27, 1989) to be codified at 1.7(d), 5.2(n)(4), 5.5(a)(1)(ii)(A) and 5.5(a)(4)(iv) of title 29 of the Code of Federal Regulations or to implement or administer any other regulation that would have the same or similar effect.

practices.' " Pet. App. 10a. Rather, the court noted, under the new regulations "[a]ny federal project employing the helper category will reflect either the practice of contractors employing a majority of journeymen in the locality or a majority of workers engaged in relevant employment in a weighted average locality." *Id.* at 10a-11a. Further, the court rejected petitioner's claim that using a supervision-based, rather than a task-based, definition of "helpers" would undermine the purposes of the Act by allowing federal contractors to replace many higher-paid journeymen with helpers; that claim, the court explained, had been resolved against petitioners in their earlier challenge to the 1982 regulations. *Id.* at 11a.

The court also found illusory petitioners' contention that the Secretary's regulations would "sweep[] 'higher paid' laborers into the category of 'lower paid' helpers." Pet. App. 12a. First, the court questioned whether semi-skilled helpers would necessarily be paid less than unskilled or semi-skilled laborers. Second, the court noted that the new regulations would give full weight to the amount paid to union laborers; a person classified by the union as a laborer would count as a helper if he satisfied the regulatory definition of "helper." Hence, any "laborers" who in substance served as helpers would have their wage rates taken into account in the Secretary's determination of helpers' prevailing wages. *Ibid.* Accordingly, the court found the methodology for determining when a helper classification is "prevailing" to be consistent with the Davis-Bacon Act and the APA.

DISCUSSION

The decision of the court of appeals is correct, and it does not conflict with the decision of any other court of appeals or of this Court. Hence, further review is unwarranted.

1. a. The Davis-Bacon Act in relevant part requires that covered federal contracts "contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics" on similar projects in the area. 40 U.S.C. 276a(a). Thus, by its plain terms, "the statute delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing." Pet. App. 24a.

Where, as in Section 276a, Congress has made an "explicit delegation of substantive authority," the Secretary's rules implementing the statutory terms are "entitled to more than mere deference or weight," because Congress has "entrust[ed] to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term[s]." *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981). In those circumstances, "[a] reviewing court is not free to set aside [implementing] regulations simply because it would have interpreted the statute in a different way." *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977). Rather, to prevail on judicial review, petitioners must carry the heavy burden of showing that the regulations bear no relationship to "any recognized concept" of prevailing wages, that they would defeat the purpose of the Davis-Bacon Act, or that they are otherwise arbitrary, capricious, or contrary to law. See *id.* at 426, 428; see also Pet. App. 29a (regulation

is subject to review to ensure that the Secretary "is acting consistently with the purposes of the statute and that his choice is not arbitrary").[3]

The regulations at issue in this case cannot be invalidated under that standard. In 1983, the court of appeals upheld the Secretary's regulation adopting the present definition of "helper," and this Court denied further review. *Building & Construction Trade Dep't* v. *Donovan*, 464 U.S. 1069 (1984). At the same time, however, the court of appeals also found that a helper classification could not be employed unless its use was "prevailing" in the relevant locality. Pet. App. 41a-44a. As the court explained, "if a given lower paid job classification need only be 'identifiable' in the community to be used on a government construction site, the wages paid for some work may well be less than those 'prevailing' for that work in the community." *Id.* at 42a. That, in turn, would be contrary to the purposes of the Davis-Bacon Act. *Id.* at 44a.

In response to that decision, the Secretary in 1989 promulgated the present regulations, limiting the use of helpers to federal projects in areas in which the use of helpers is a "prevailing" practice. Thus, a helper classification may be used only where it reflects the practice of contractors who pay the prevailing rate to the majority of journeymen in the area or who employ a majority of skilled and semi-skilled craft workers in the locality. 29 C.F.R. 1.7(d)(1) and (2) (1991).

[3] *Gray Panthers* involved a statutory provision leaving the question of "availab[ility]" of resources to be "determined in accordance with standards prescribed by the Secretary." 453 U.S. at 44 (emphasis omitted). In *Batterton*, the Court interpreted a statute providing that "unemployment" is to be "determined in accordance with standards prescribed by the Secretary." 432 U.S. at 418 n.2.

b. Petitioners contest the Secretary's approach on the ground that it allows the use of a helper classification where it is merely an "identifiable," not a "prevailing," practice. Pet. 12. That contention, however, is unsupported by the pertinent regulations, which reasonably define the circumstances in which the use of helpers is a "prevailing practice." If there is a single prevailing wage for journeymen—*i.e.*, a rate that is paid to a majority of the journeymen in an area—the Secretary treats as "prevailing" the practice of the contractors whose rates define the "prevailing" journeyman wage. 29 C.F.R. 1.7(d)(1). Where a group of contractors sets the prevailing practice for the wage rates of journeymen, there is no reason why the practices of that group should not also be deemed "prevailing" when they concern the classification for workers hired to assist those journeymen. In the absence of any such "majority wage," moreover, the Secretary has reasonably determined that the "prevailing" practice should reflect the practice of those contractors who employ a majority of the skilled and semi-skilled workers in a craft in the locality. See 29 C.F.R. 1.7(d)(2). While it is true that there may be other ways to define whether a classification "prevails" in a locality, petitioners have not demonstrated why the Secretary's definition of "prevailing"—which closely tracks the method used to determine a "prevailing wage" (29 C.F.R. 1.2(a)(1))—is irrational.

Petitioners counter, however, that the Secretary's methodology is flawed because it does not take into account "laborers," who may be performing semi-skilled work under the supervision of journeymen, in determining the prevailing practice. Pet. 12-14, 19-20. But that contention misconstrues the substance of the helper regulations, which in fact take such

"laborers" into account. As the court of appeals (Pet. App. 12a) and the district court (*id.* at 65a-67a) recognized, the regulations define "helper" not in terms of the label that the union or the employer attaches to its workers, but in terms of the workers' skill level and degree of their supervision; a "helper" is "a semi-skilled worker * * * who works under the direction of and assists a journeyman." 29 C.F.R. 5.2(n)(4). There is nothing in the Act or implementing regulations to suggest that such workers, even if the union denominates them "laborers," are to be excluded in determining whether a helper classification is "prevailing" or what the "prevailing wage" is for helpers in a locality where the classification is employed. See Pet. App. 11a-12a, 65a-66a.[4]

c. Petitioners also claim that the helper regulations violate the APA because the preamble to the new regulations states that semi-skilled helpers would only rarely displace unskilled laborers; that position, petitioners claim, is an unsupported departure from the Secretary's past assumption that low-wage

[4] Petitioners claim (Pet. 19-20) that the Secretary's position that laborers may be counted is merely a post hoc rationalization for an otherwise invalid rule. The Secretary's position, however, is fully evident from the definition of a "helper," which states without qualification that a "helper" is a semi-skilled worker who works under a journeyman's supervision. 29 C.F.R. 5.2(n)(4). And while it is true that the preamble to the new regulations notes that "for the most part, laborer classifications will not generally meet the definition set forth for the helper classification," 54 Fed. Reg. at 4,238, that observation is not equivalent to the proposition that a "laborer" will not count as a "helper" if he does satisfy the regulatory definition. Indeed, the Secretary rejected one proposal (advanced by petitioners) precisely because the availability of a helper classification would have turned on nomenclature or job title as such. *Ibid.*

helpers would replace higher-wage laborers. Pet. 15-19. The Secretary, however, has always assumed that helpers would substitute primarily for journeymen. When the Secretary initially promulgated the helper regulations in 1982 and proposed the present regulations in 1987, the agency's estimates of cost savings were based on alternative assumptions of substitution for journeymen alone and substitution for journeymen and laborers. See 52 Fed. Reg. at 31,368-31,371; 47 Fed. Reg. at 23,650-23,651. And in 1987 the Secretary predicted that the "[p]rincipal substitution is likely to be for journeymen." 52 Fed. Reg. at 31,370. Following a review of approximately 2,000 comments (including some submitted by petitioners) in light of the Department's enforcement experience under the Act, the Secretary in 1989 concluded that helpers would not be likely to substitute for laborers in any significant degree. 54 Fed. Reg. at 4,234, 4,237-4,238, 4,242.

To be sure, the Secretary acknowledged that union "laborer" rates may be higher than open-shop "helper" rates. 54 Fed. Reg. at 4,242. That does not compel the conclusion, however, that helpers will widely replace laborers. First, the primary incentive will be to replace journeymen with helpers, since journeymen are routinely the highest paid workers. Second, as the Secretary explained in promulgating the present regulations, "where the majority rate prevails for the journeymen and union rates are [thus] found to be prevailing in the area, the decision rule is not likely to produce a finding of prevailing helpers." *Ibid.* And where there is no majority rate and the weighted-average method is used to determine whether to recognize a helper classification

typically in open shop or mixed areas[5]—then semi-skilled helper rates will likely be above unskilled laborer rates. *Ibid.* Where that is the case, "there will be no economic incentive for contractors to replace laborers with helpers." *Ibid.*[6]

Further, the district court was correct in holding (Pet. App. 67a) that "the analytical statement that helpers will generally not substitute for laborers does not affect the implementation of the regulation or its rationale, and it therefore does not affect the validity of the rule." With respect to the cost saving rationale for the revision, the Secretary had estimated that substantial cost savings would result whether helpers substituted only for journeymen or for journeymen and laborers. See 52 Fed. Reg. at 31,370. In addition, the question whether helpers will in fact replace laborers has no effect on the underlying justification for the revisions adopted by the Secretary. As discussed, in the exercise of her broad discretion to define "prevailing wages" under the Davis-Bacon Act, the Secretary has devised a rational and workable method for determining whether the helper classification prevails in a particular area. Even if petitioners were correct that this rule may result in some substitution of lower-cost helpers for

[5] As the Secretary explained, "[w]here there is no 'majority' journeyman rate and the weighted average rule controls, then it is likely that the projects surveyed will be predominantly open shop or a mixture of open shop and union projects." 54 Fed. Reg. at 4,238.

[6] We are advised by the Department of Labor that, in any case, if a contractor classifies as "helpers" workers who do not meet the "helper" definition, the workers will be found to be misclassified, and the contractor will be required to pay the workers the difference between the rate paid and the applicable rate for the work performed.

higher-cost union laborers, the Davis-Bacon Act is not a guarantee of the most favorable possible wages; it merely requires contractors on covered projects to pay the wages "prevailing" in an area. 40 U.S.C. 276a(a). Previously, federal wages on covered projects, "rather than being below those in the private sector, [were] in some cases far above." Pet. App. 52a. By recognizing helper classifications where the use of helpers is a prevailing practice, the new rules directly advance the statutory objective of seeing that the wages received by workers on covered federal projects reflect current construction industry practices in each geographic area.

2. In challenging the new helper regulations, petitioners rely heavily (Pet. 20-30) upon the Dire Emergency Supplemental Appropriations for Consequences of Operation Desert Shield/Desert Storm, Food Stamps, Unemployment Compensation Administration, Veterans Compensation and Pensions and Other Urgent Needs Act of 1991, Pub. L. No. 102-27, § 303, 105 Stat. 151, which provides in pertinent part:

> Notwithstanding any other provision of law, no funds shall be expended by the Secretary of Labor to implement or administer the regulations published at 54 Federal Register 4234-44 (January 27, 1989) to be codified at 1.7(d), 5.2(n)(4), 5.5(a)(1)(ii)(A) and 5.5(a)(4)(iv) of title 29 of the Code of Federal regulations or to implement or administer any other regulation that would have the same or similar effect.

Petitioners' reliance, however, is misplaced. Consistent with settled principles governing the interpretation of substantive riders to appropriations Acts, the court of appeals correctly held that Section 303 only barred the Secretary from expending funds to

administer and implement the helper regulations during Fiscal Year 1991—the year in which the pertinent appropriations Act was in effect. Pet. App. 7a-9a.

"Since an appropriation act is made for a particular fiscal year, the starting presumption is that everything contained in the act is effective only for the year covered." General Accounting Office, *Principles of Federal Appropriations Law* 2-29 (2d ed. 1991). Accordingly, a proviso contained in such an Act is presumed not to be permanent unless Congress has clearly expressed its intent to the contrary. As Justice Story explained for the Court in 1841:

> It would be somewhat unusual, to find engrafted upon an act making special and temporary appropriations, any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation.

Minis v. *United States*, 40 U.S. (15 Pet.) 423, 445 (1841); accord, *United States* v. *Vulte*, 233 U.S. 509, 514-515 (1914); *Chiles* v. *Thornburgh*, 865 F.2d 1197, 1203-1204 (11th Cir. 1989). Here, the operative language does nothing to indicate that Congress intended the proviso to be permanent. Pet. App. 9a. Because Congress has at its ready disposal well established terms of art that convey futurity or permanence, see, *e.g.*, *Cella* v. *United States*, 208 F.2d 783, 790 (7th Cir. 1953) ("use of the word 'hereafter' by Congress as a method of making legislation permanent is a well-known practice"), cert. denied, 347 U.S. 1016 (1954), the court of appeals was correct in

reading Congress's failure to include any language of futurity or permanence as a strong indication that the proviso was intended to expire with the appropriation Act at the end of Fiscal Year 1991.[7]

Indeed, a supplemental appropriations bill passed by the House of Representative on July 28, 1992, provides that "no funds shall be expended hereafter by the Secretary of Labor to implement or administer [the helper regulations]." H.R. 5620, 102d Cong., 2d Sess. § 301 (1992). On September 15, 1992, the Senate also passed H.R. 5620, including the permanent rider relating to the helper regulations. See 138 Cong. Rec. S13, 446 (daily ed.). That rider, however, was ultimately deleted from the bill in response to a threatened veto. See Daily Lab. Rep. (BNA) No. 183, at A-13 (Sept. 21, 1992); 138 Cong. Rec. S14, 027, S14,038-S14,039 (daily ed. Sept. 18, 1992). Nevertheless, the recent legislative action not only confirms that this Congress knows how to use settled terms of art to confer permanency on the appropriations bar at issue,

[7] It is true that the proviso at issue, as part of an emergency supplemental appropriation bill, did not accompany the Department of Labor appropriation to which it applies—a factor recognized as some indication of permanence (see *Principles of Federal Appropriations Law*, *supra*, at 2-31 to 2-32). Petitioners also cite (Pet. 26-27) scattered floor statements suggesting that some Members of Congress understood the rider to be permanent. However, the presence or absence of words of futurity "remains the crucial factor, and [such] additional factors have been used for the most part to support a conclusion based on this presence or absence." *Principles of Federal Appropriations Law*, *supra*, at 2-33. The court of appeals therefore properly declined either to infer "from the absence of an appropriation standing alone that Congress intended to impose a permanent ban," or to allow petitioners to use legislative history to "reconstruct" a statute whose language contains no suggestion of futurity. Pet. App. 9a.

but also that the political branches have focused directly on the matter at issue here. In the absence of any conflict among the court of appeals, further review of the court of appeals' decision is unwarranted. [8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ANTHONY J. STEINMEYER
ROBERT M. LOEB
Attorneys

SEPTEMBER 1992

[8] Petitioners also contend that the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1992, Pub. L. No. 102-170, 105 Stat. 1107 (1991), supports a permanent bar against implementing the helper regulations. Pet. 27-30. Congress, however, appropriated (105 Stat. 1110) $231,326,000 of unrestricted funds for the Employment Standards Administration of the Department of Labor, which implements the Davis-Bacon Act. While the Act contains several provisions barring the Secretary from expending funds on various matters, see §§ 102-104, 105 Stat. 1114, it did not restrict the ESA from spending any part of its appropriation to implement the helper regulations. In the absence of any such prohibition, the Secretary is free to spend any part of the $231 million appropriated for that purpose. See *International Union, United Automobile Workers* v. *Donovan*, 746 F.2d 855, 860-861 (D.C. Cir. 1984), cert. denied, 474 U.S. 825 (1985).